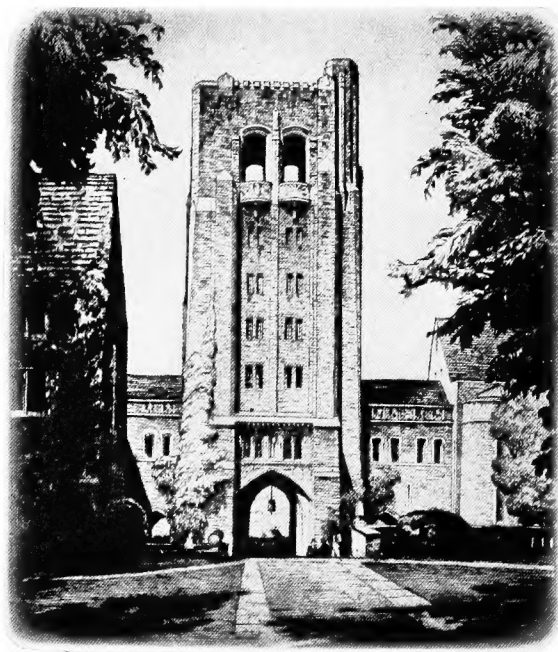


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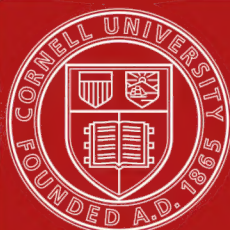
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# FEDERAL LIABILITIES OF CARRIERS

A TREATISE UPON THE DUTIES AND LIABILITIES OF COMMON  
CARRIERS BY RAILROADS UNDER ALL FEDERAL LAWS, WITH  
AN APPENDIX CONTAINING A COPY OF THE FEDERAL  
STATUTES AFFECTING RAILROADS, AND THE GEN-  
ERAL ORDERS OF THE DIRECTOR GENERAL OF  
RAILROADS UNDER THE FEDERAL CONTROL  
ACT OF 1918.

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IN TWO VOLUMES  
VOLUME II

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# TABLE OF CONTENTS

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## VOLUME I.

### PART ONE

#### FEDERAL AND STATE CONTROL OVER COMMON CARRIERS.

##### CHAPTER I.

##### THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

- Sec. 1. Congress Vested with Authority to Regulate All Interstate and Foreign Commerce.
- Sec. 2. Early Judicial Construction of the Commerce Clause—*Gibbons v. Ogden*.
- Sec. 3. Judicial Definitions of Term "Interstate Commerce" as Used in the Federal Constitution.
- Sec. 4. Transportation from one State to Another an Essential Element of Interstate Commerce.
- Sec. 5. Congressional Grant "to Regulate" Commerce Defined and Explained.
- Sec. 6. Importation of Legitimate Articles of Commerce from one State to Another Immune from State Legislation.
- Sec. 7. Commencement and Termination of Protection of the Commerce Clause.—Original Package Rule.
- Sec. 8. States may Forbid Introduction of or Exportation of all Articles not Legitimate Subjects of Trade and Commerce.
- Sec. 9. Statutory Exceptions Empowering States to Regulate Interstate Shipments of Intoxicating Liquors.

## CHAPTER II.

## RESPECTIVE POWERS OF THE STATES AND NATIONAL GOVERNMENT OVER INTERSTATE AND INTRASTATE CARRIERS.

- Sec. 10. Introductory.
- Sec. 11. General Principles Determining State and National Control Over Interstate Carriers and Transportation.
- Sec. 12. Foregoing Doctrines Illustrated and Applied to Divers Phases of Interstate Carriage and Transportation.
- Sec. 13. Federal Laws and Regulations Encroaching upon Powers of the States over Their Internal Affairs, Invalid.
- Sec. 14. Federal Regulation to be Valid Must Have Real or Substantial Connection with Interstate Commerce.
- Sec. 15. When Congressional Power may be Validly Exercised over Intrastate Subject Matters.
- Sec. 16. When Congress Legislates upon a Subject Matter of Commerce, State Laws Covering Same Field are Thereby Superseded.
- Sec. 17. Difficulty of Defining Field or Subject Matter Covered by Congressional Legislation.
- Sec. 18. Common Law Principles as Applied in State Courts Superseded as to Subject Matters Covered by Federal Statutes.
- Sec. 19. Power of States to Regulate Interstate Rates of Carriers Formerly Upheld by Supreme Court—The Granger Cases.
- Sec. 20. State Control Over and Power to Regulate Rates and Charges on Interstate Shipments Denied.
- Sec. 21. Passenger Fares for Interstate Journeys Prescribed by Municipal Ordinances and Accepted by Carriers Invalid.
- Sec. 22. Power of States over Intrastate Commerce as Broad and Exclusive as Control of Congress over Interstate Commerce.
- Sec. 23. States May Regulate and Fix Reasonable Rates for Intrastate Transportation.
- Sec. 24. Statutes of States Regulating Delivery of Cars for Interstate Shipment Inoperative.
- Sec. 25. States may Compel Switch Connections with Private Side Tracks for Intrastate Business.
- Sec. 26. State Statutes Prescribing Rates Specified in Bill of Lading Void as to Interstate by Valid as to Intrastate Shipments.
- Sec. 27. State Laws and Decisions Governing Liability for Loss and Damage to Property Superseded by Carmack Amendment.
- Sec. 28. State Statute Authorizing Issuance of Transportation in Payment for Advertising Invalid.
- Sec. 29. States May Require Operation of Trains Between Intrastate Points on Interstate Lines—Limitations and Exceptions.



## TABLE OF CONTENTS.

v

- Sec. 30. State and Municipal Regulations Prescribing Speed, Signals and Stoppage of Interstate Trains.
- Sec. 31. Georgia "Blow-Post" Law Invalid, Being a Direct Burden upon Interstate Commerce.
- Sec. 32. States May Compel Carriers to Make and Maintain Track Connections for Interchange of Traffic.
- Sec. 33. Validity of State Laws Providing for "Full Crews" on Interstate Trains.
- Sec. 34. State Regulations or Charges for Transportation by Water.
- Sec. 35. Statutory Enactment of States Requiring Facilities and Appliances on Interstate Trains.
- Sec. 36. Power of States over Interstate Employers and Employees in Absence of Federal Legislation.
- Sec. 37. Interstate Messages by Telegraph Prior to Amendment of 1910 to Act to Regulate Commerce.
- Sec. 38. State Laws Regulating Interstate and Foreign Messages of Telegraph, Telephone, and Cable Companies, Invalid.
- Sec. 39. States May Not Regulate "Ticker Service" of Interstate Telegraph Companies.
- Sec. 40. State and Municipal Regulations of the Interstate Business of Express Companies.
- Sec. 41. Valid Municipal Regulations of Drivers on Streets Carrying Interstate Traffic.

### CHAPTER III.

#### FEDERAL CONTROL OF CARRIERS DURING TIMES OF WAR.

- Sec. 42. Powers of Congress over Carriers during Times of Peace and War Distinguished.
- Sec. 43. President Empowered to Assume Control of Transportation Systems in Time of War.
- Sec. 44. Proclamation Assuming Control of Railroads Under Foregoing Provisions.
- Sec. 45. National Statute Providing for Federal Control and Compensation of Carriers During the Period of War with Germany.
- Sec. 46. Purpose of Congress in Enacting the Act Providing for Federal Control During War.
- Sec. 47. Effect of National Statute Providing for Federal Control upon other Laws, Federal and State.
- Sec. 48. President Authorized to Initiate Rates and Charges for Transportation During Period of Federal Control.
- Sec. 49. Actions at Law or Suits in Equity may be Brought by and Against Carriers under Federal Control.
- Sec. 50. Penalty for Violations of the Provisions of the Federal Control Act.
- Sec. 51. When Federal Control of Transportation System Under the Statute shall Terminate.

## PART TWO

DUTIES AND LIABILITIES OF COMMON CARRIERS TO SHIPPERS  
UNDER ALL FEDERAL INTERSTATE LAWS.

The Act to Regulate Commerce and  
Supplementary Legislation.

Carmack and Cummins Amendments.  
Federal Bill of Lading Law.

## CHAPTER IV.

THE ACT TO REGULATE COMMERCE AS ORIGINALLY ENACTED  
—ITS GENESIS, PURPOSE, GENERAL SCOPE  
AND VALIDITY.

- Sec. 52. Brief Historical Review of Federal Control over Carriers and Scope Thereof.
- Sec. 53. Causes Leading to Enactment of the Act to Regulate Commerce.
- Sec. 54. Principles of the Common Law Inadequate to Curb Evils of Railroad Operation.
- Sec. 55. Futile Attempts of the States to Regulate Charges for Interstate Transportation.
- Sec. 56. Effect of the Decision in *Wabash, St. L. & P. Ry. Co. v. Illinois*.
- Sec. 57. Power of Congress to Regulate the Duties of Carriers of Interstate Traffic.
- Sec. 58. First Step Towards Federal Regulation of Interstate Transportation by Rail—The Cullom Committee.
- Sec. 59. Report of Cullom Committee to Congress and Bill Recommended on January 18, 1886.
- Sec. 60. Fundamental Requirements of the Act to Regulate Commerce as Originally Enacted in 1887.
- Sec. 61. Purpose of Congress in Enacting Original Act to Regulate Interstate Commerce.
- Sec. 62. How the Interstate Commerce Act should be Construed and Interpreted.
- Sec. 63. Commission not Authorized Under Original Act of 1887 to Prescribe Rates for Transportation.

## CHAPTER V.

CHRONOLOGICAL REVIEW OF LEADING AMENDMENTS OF  
STATUTE.

- Sec. 64. Scope of the Chapter.
- Sec. 65. Amendments of 1889 and 1891 to the Interstate Commerce Act.
- Sec. 66. Invalid Provision of Section 12 Remedied by Passage of Compulsory Testimony Act of 1893.



- Sec. 67. Provisions Prohibiting Rebates and Discriminations Strengthened by Passage of Elkins Act of 1903.
- Sec. 68. Scope of Act and Powers of Commission Greatly Extended Through Amendments Incorporated by Hepburn Act of 1906.
- Sec. 69. Initial Carrier Liable for Loss and Damage on Lines of Connecting Carrier—Carmack Amendment.
- Sec. 70. Commission Empowered to Order Switch Connection with Private Side Tracks and Lateral Branch Lines.
- Sec. 71. Carriers Prohibited from Owning or Having an Interest in Freight Transported—the Commodity Clause.
- Sec. 72. Amendments Authorizing Commission to Prescribe Through Routes and Joint Rates.
- Sec. 73. Commission Authorized to Determine Allowances to Shippers for Services Rendered in Connection with Transportation.
- Sec. 74. Amendment of 1906 Prohibiting the Issuance and Giving of Free Passes—Persons Excepted.
- Sec. 75. Forms of All Accounts, Records and Memoranda Kept by Interstate Carriers Placed under Jurisdiction of Commission.
- Sec. 76. Amendments and Additions to the Statute by the Mann-Elkins Act of 1910.
- Sec. 77. Fraudulent Claims for Loss and Damage by Shippers Against Carriers Penalized.
- Sec. 78. Power Conferred upon Commission by 1910 Amendment to Suspend Proposed Changes in Rates.
- Sec. 79. The 1910 Amendment to the Long and Short Haul Provision.
- Sec. 80. Statutory Duty of Carriers to Route Interstate Freight as Directed by Shippers.
- Sec. 81. Carriers and Their Agents Prohibited from Giving Information Relating to Business of Interstate Shippers.
- Sec. 82. Extension of Jurisdiction of Commission over Water Carriers by Panama Canal Act of 1912.
- Sec. 83. Act of 1913 Requiring Commission to Ascertain Valuation of Property Owned or Used by all Interstate Carriers.
- Sec. 84. Amendment of 1917 Penalizing Persons for Obstructing Movement of Interstate Commerce During War.
- Sec. 85. President Authorized During War to Direct Movement of Commodities Essential to National Defense.

## CHAPTER VI.

## COMMON CARRIERS SUBJECT TO THE INTERSTATE COMMERCE ACT.

- Sec. 86. The Statutory Provision.
- Sec. 87. Who are Common Carriers Within the Meaning of the Interstate Commerce Act.

- Sec. 88. Distinction Between Common Carriers and Plant Facilities —Industrial Railways.
- Sec. 89. All Carriers in Territories, District of Columbia and Alaska Included.
- Sec. 90. When Railroads Wholly Within Limits of Single State are Under Federal Control—Former and Present Rule.
- Sec. 91. Carriers Engaged in Transportation Between Points in United States and Adjacent Foreign Countries.
- Sec. 92. Carriers by Water Included as to Continuous Shipments Under Common Arrangements with Carriers by Rail.
- Sec. 93. Independent Ferry Companies Included as to Shipments Under Common Arrangement with Rail Carriers.
- Sec. 94. Common Control, Management, and Arrangement for Continuous Transportation, Defined and Explained.
- Sec. 95. Extension of Federal Jurisdiction Over Water Carriers by Panama Canal Act of 1912.
- Sec. 96. Amendment Applies to Traffic Between Two Points in United States Passing Through Panama Canal "or Otherwise."
- Sec. 97. Control or Ownership of Competitive Water Line by Rail Carrier Subject to Approval of Commission.
- Sec. 98. Policy of Congress in Adoption of That Part of Panama Canal Act Forbidding Ownership of Water Lines by Rail roads.
- Sec. 99. Bridges and Bridge Companies Subject to Federal Act, When.
- Sec. 100. Street Railroads Crossing State Lines not Subject to Interstate Commerce Act.
- Sec. 101. Electric Interurban Railroads Engaged in Interstate Commerce Controlled by Statute.
- Sec. 102. Status of Terminal Railroads and Belt Lines Participating in Movement of Interstate Traffic.
- Sec. 103. Stock Yards Company Transferring Livestock Between its Pens and Tracks of Trunk Lines, a Common Carrier.
- Sec. 104. Status of Logging Roads as Interstate Carriers—the Tap Line Cases.
- Sec. 105. Private Car Lines not Common Carriers within Meaning of Act to Regulate Commerce.
- Sec. 106. Common Carriers of Oil and Other Commodities by Pipe Line Included.
- Sec. 107. Pipe Line Companies Transporting Solely Their Own Oil, Common Carriers, When.
- Sec. 108. Assumption of National Control over Interstate and Foreign Cable, Telephone and Telegraph Companies.
- Sec. 109. Independent Express Companies Included by Hepburn Amendment of 1906.
- Sec. 110. Sleeping Car Companies Placed Under Jurisdiction of Commission by Hepburn Act of 1906.
- Sec. 111. Receivers and Purchasers Pendente Lite.

- Sec. 112. Railroad Companies Incorporated in Foreign Countries and Engaged in Interstate Commerce.
- Sec. 113. Statute Applies to Individuals and Partnerships as Well as Incorporated Companies.

## CHAPTER VII.

## SHIPMENTS AND TRANSPORTATION SERVICES CONTROLLED BY INTERSTATE COMMERCE ACT.

- Sec. 114. Constitutive Elements of Interstate Transportation Within the Act.
- Sec. 115. Illustrative Applications of the Foregoing Principles in Adjudicated Cases.
- Sec. 116. Shipments Between Two Points in Same State Passing Enroute Through Another State.
- Sec. 117. Absence of Definite Destination in Foreign Country or in Other State Immaterial.
- Sec. 118. Change of Destination in Transit as Affecting Interstate Character of Shipment.
- Sec. 119. Interstate Transportation Includes Receipt and Delivery of Traffic as Well as Actual Carriage.
- Sec. 120. When Temporary Stoppage or Interruption Changes Interstate Character of Shipment into Intrastate and Vice Versa.
- Sec. 121. When Interstate or Intrastate Character of a Shipment is not Changed by Temporary Stoppage or Interruption.
- Sec. 122. Sale and Delivery of Coal f. o. b. Cars at Mine for Transportation to Purchasers Outside the State.
- Sec. 123. Shipments from Points in One State to a Port of Transshipment in Same State for Export Included.
- Sec. 124. Shipments from One Foreign Country to Another Through the United States Beyond Control of Commission.
- Sec. 125. Regulation of Terminal Charges, Service and Facilities for Interstate Shipments.
- Sec. 126. Transportation Wholly Within One State Not Under Federal Control.
- Sec. 127. Transit Privileges Part of Transportation Under Control of Interstate Commerce Commission.
- Sec. 128. Regulation of Grain Elevation Service Under Federal Control.
- Sec. 129. Loading, Dunnage and Special Preparation of Freight Cars for Shipments of Particular Commodities.
- Sec. 130. Weighing of Interstate Shipments of Freight Under Federal Control.
- Sec. 131. Regulations and Rules Concerning Baggage of Interstate Passengers Under Control of Commission.
- Sec. 132. Refrigeration, Ventilation and Icing of Property in Cars Part of Transportation Duties of Interstate Carriers.
- Sec. 133. Track Storage and Demurrage Charges in Connection With

Interstate Shipments Under Control of Commission.

- Sec. 134. Wharves and Connecting Tracks of Interstate Carriers Public Facilities Under Federal Control.
- Sec. 135. Jurisdiction of Commission Over Port Switching Service Performed on Import Traffic.
- Sec. 136. Interstate Transportation by Land of Explosives and Other Dangerous Articles Under Federal Control.
- Sec. 137. Peddling Merchandise from Cars not Transportation Service Which Carriers may be Compelled to Furnish.
- Sec. 138. Terms "Railroad" and "Transportation" Defined by Statute.
- Sec. 139. Statute not Applicable to all Interstate Commerce.

CHAPTER VIII.

UNJUST DISCRIMINATIONS AND UNLAWFUL PREFERENCES  
BY INTERSTATE CARRIERS—GENERAL  
PRINCIPLES.

- Sec. 140. Statutory Definitions of Unjust Discriminations and Undue Preferences.
- Sec. 141. Unlawful Discriminations and Preferences Between Shippers Under the Common Law.
- Sec. 142. Origin and History of Sections Two and Three of the Interstate Commerce Act.
- Sec. 143. Purpose and Object of Congress in the Enactment of Sections Two and Three.
- Sec. 144. Relation and Distinction Between Sections Two and Three.
- Sec. 145. Distinction Between Section Two and Clause in Section One Prohibiting Unjust and Unreasonable Charges.
- Sec. 146. Statutory Conditions Rendered Difference in Charges Unlawful Under Section Two.
- Sec. 147. Circumstances and Conditions Determining Dissimilarity of Service Under Section 2 Refer Strictly to Matters of Carriage.
- Sec. 148. Unjust Discrimination and Preference Sections of Original Act Apply to Subsequent Amendments Defining Railroads and Transportation.
- Sec. 149. Distinction Between Ordinary Definition of Rebate and the Meaning of That Term Under Provisions of Section Two.
- Sec. 150. Discrimination Under Section 3 Must Ordinarily be Prejudicial to One Party and Source of Advantage of the Other.
- Sec. 151. Relation of Discrimination Clause to the Elkins Act of 1903.
- Sec. 152. All Methods and Means Employed Unlawful if Ultimate Results Thereof Cause Unjust Discriminations.
- Sec. 153. Effect of Statute Upon Contracts with Discriminatory Provisions.

- Sec. 154. Terms "Unreasonable" or "Undue" Imply Comparison of all Facts and Circumstances Applicable.
- Sec. 155. Existence of Undue Preference or Unjust Discrimination a Question of Fact.
- Sec. 156. Strict Uniformity Not Always Required.
- Sec. 157. Long Existence of Undue Discrimination No Justification for its Continuance.
- Sec. 158. Prohibition Against Unjust Discrimination Covers Judgments by Consent and Waiver of Valid Defenses.
- Sec. 159. Proof of Injury and Measure of Damages in Actions for Unlawful Discrimination.

## CHAPTER IX.

## DISCRIMINATIONS BETWEEN SHIPPERS AS TO RATES, SERVICES, FACILITIES AND ALLOWANCES.

- Sec. 160. Carrier Must Deal with All Its Shippers on Absolute Equality and Must Afford Equal Facilities.
- Sec. 161. Difference in Rates When Based Upon Difference in Service Not Discriminatory.
- Sec. 162. Different Rates for Wholesalers and Retailers Prohibited.
- Sec. 163. Rates for Train Loads Lower Than for Single Car Loads Subject Small Shippers to Undue Disadvantage.
- Sec. 164. Higher Rates on Domestic Than on Export Traffic Between Ports of Entry and Inland Points not Discriminatory.
- Sec. 165. Doctrine of Import Case Applied and Illustrated.
- Sec. 166. Use of Terminal Facilities by Permitting Interchange of Traffic with one Carrier and Denying it to Another.
- Sec. 167. Discrimination in Reserving Right to Route Through Shipments Beyond Carrier's Terminal—Former and Present Rule.
- Sec. 168. Discrimination in Refusal of Rail Carriers to Establish Through Routes and Joint Rates with Water Lines.
- Sec. 169. Exclusive Privileges for Auxiliary Facilities at Stations and Terminal Grounds Lawful.
- Sec. 170. Distribution of Cars Among Shippers During Time of Shortage Must be Free from Discrimination.
- Sec. 171. Preferences and Discriminations in Demurrage and Track Storage Charges.
- Sec. 172. Unreasonable Compensation to Shippers for Services in Connection with Transportation.
- Sec. 173. Abnormal Division of Joint Rates to Carrier Unlawful.
- Sec. 174. Undue Discriminations in Divisions of Joint Through Rates to Tap Lines or Logging Roads.
- Sec. 175. Grant of Wharfage Privileges to One Shipper Denied to Others Unlawful.
- Sec. 176. Unlawful Discriminations and Preferences in Transit Privileges.

- Sec. 177. Compensation for Transit Privileges Not Limited to Actual Cost.
- Sec. 178. Extension of Transit Privilege Over Twelve Months Unreasonable—Exceptions Permitted.
- Sec. 179. Carriers May Allow Compensation to One Shipper for Transportation Services and Deny Same Privilege to Another.
- Sec. 180. Contracts Requiring Expedited Services Not Open to All Shippers Invalid.
- Sec. 181. Preferential Rates to Other Carriers as Shippers Prohibited.
- Sec. 182. Foregoing Rules Illustrated and Applied.
- Sec. 183. Storage Regulations Must Be Enforced Without Preference or Discrimination.
- Sec. 184. Haulage by Stage or Wagon from Destination Points not a Dissimilar Circumstance Justifying Lower Rates.
- Sec. 185. Preparing Cars for Shipment of Commodities for Some Shippers and Refusing Same Service to Others.
- Sec. 186. Grain Elevator Service Must be Open to All Shippers Without Preference.
- Sec. 187. Allowances When Owner of Elevator is Shipper of Grain—Former and Present Rule.
- Sec. 188. Allowances for Lighterage Services to Shipper Within Free Delivery Zone not Discriminatory as to Shipper Beyond Zone.
- Sec. 189. Rebating Part of Freight Rates in Payment for Land for Right of Way.
- Sec. 190. Assisting One Shipper to Collect Private Charges and Refusing Same Service to Another.
- Sec. 191. Discrimination in Demanding Cash Payment of Some Shippers and Extending Credit to Others—Conflicting Decisions.
- Sec. 192. Deduction from Freight Rates to Pay Shipper for Building Tie Hoist Invalid.
- Sec. 193. Difference in Rates on Freight Not Justified by Different Methods of Loading.
- Sec. 194. Carrier "Spotting" Cars for One Shipper and Refusing Same Service to Another Similarly Situated.
- Sec. 195. Trap Car Service Not Unlawful If Practiced Without Discrimination.

#### CHAPTER X.

##### UNLAWFUL PREFERENCES IN RATES AND PRACTICES BETWEEN CITIES, COMMUNITIES AND LOCALITIES.

- Sec. 196. Preferences Between Cities and Localities Under the Common Law Not Forbidden.
- Sec. 197. Equality Between Communities under Similar Circumstances and Conditions Required.
- Sec. 198. When Higher Rates to One Point Than to Another are Unjustly Discriminatory.



- Sec. 199. All Localities Entitled to Non-Discriminatory Rates.
- Sec. 200. Undue Prejudice Between Localities Resulting from Different Interstate and Intrastate Rates—Shreveport Case.
- Sec. 201. Every City and Locality Entitled to Benefit of Natural Advantages.
- Sec. 202. Rates to One Locality Per Se Reasonable, Unlawful if Another Locality is Prejudiced Thereby.
- Sec. 203. Basing Point System of Rate-Making Legal but Subject to Control of Commission.
- Sec. 204. Discriminations and Preferences Produced by Competition Between Localities not Undue or Unreasonable.
- Sec. 205. Limitation Upon Competition in Determining Whether Discrimination is Unjust or Preference Undue.
- Sec. 206. Difference in Amount of Traffic Between Localities Similarly Situated no Justification for Discriminatory Rates and Fares.
- Sec. 207. Carrier not Guilty of Discrimination Between Localities When it Does not Participate in Rates to Favored Point.
- Sec. 208. Discrimination Between Different Coal Fields Served by Different Carriers not Unlawful.
- Sec. 209. Discrimination in the Establishment and Maintenance of Group Rates. .
- Sec. 210. Different Rates in Opposite Directions Over Same Lines Not Discriminatory.
- Sec. 211. Discrimination in Absorbing Switching Charges at One Point and Refusing at Another.
- Sec. 212. Discrimination Through Joint Rates Between Two Localities Similarly Situated Prohibited, When.
- Sec. 213. Differentials Between Atlantic Coast Cities Legitimately Based upon Competitive Relations.
- Sec. 214. Maintaining Higher Rates on Branch Line Parallel to Main Line Serving Same Territory.
- Sec. 215. Proportional Part of Through Rate Lower Than Local Rates Between Same Points Not Discriminatory.
- Sec. 216. Rebilling and Reshipping Privilege at Nashville on Grain From Ohio River to Southeastern Points Discriminatory.
- Sec. 217. Differential Between Cities on Opposite Banks of Rivers Crossed by Expensive Bridges.
- Sec. 218. Carriers Unduly Favoring Industries on Their Own Lines as Against Competitors on Other Lines.
- Sec. 219. Stopping Carload Shipments at Points En Route to Finish Loading Discriminatory, When.

## CHAPTER XI.

## UNLAWFUL PREFERENCE OR ADVANTAGE TO PARTICULAR KINDS OF TRAFFIC.

- Sec. 220. Unreasonable Preferences to any Particular Description of Traffic.

- Sec. 221. Passage of Statute Prohibiting Discriminations Stimulated Movement for a More Uniform Classification.
- Sec. 222. Duty of Commission When Classification is Used to Effect Unjust Discrimination.
- Sec. 223. Controlling Considerations in Making Classifications of Freight.
- Sec. 224. Discriminations and Preferences in the Classification of Commodities.
- Sec. 225. Differential Between Raw Material and Manufactured Products—Grain and Flour, Livestock and Meats, Etc.
- Sec. 226. Differential between Carload and Less than Carload Rates Lawful.
- Sec. 227. Relation Between Carload and Less Than Carload Rates Must not be Excessive.
- Sec. 228. Application of Carload Rates to Carload Lots when Goods Belong to Several Owners.
- Sec. 229. Wheat and Coarse Grain Not "Like Traffic" Requiring Same Rate.
- Sec. 230. Different Uses to which Commodity is Put, No Justification for Different Rates.
- Sec. 231. Justifiable Discrimination Between Shipments of Oil in Barrels and in Tank Cars.
- Sec. 232. Relationship of Rates on Lumber and Lumber Products Must be Free From Discrimination.
- Sec. 233. Differentials Between Similar Commodities Justified by Different Conditions and Circumstances Affecting Transportation—Lumber and Logs.
- Sec. 234. Lower Rates on Returned Shipments Illegal Except When Refused by Consignees.

## CHAPTER XII.

## UNJUST DISCRIMINATION AND UNLAWFUL PREFERENCE IN PASSENGER SERVICE.

- Sec. 235. Federal Statute Includes Passenger as Well as Freight Transportation.
- Sec. 236. Carrying Personal Baggage of Passengers Free Not Undue Discrimination.
- Sec. 237. Collection of Additional Fare on Trains From Passengers Without Tickets not Unlawful.
- Sec. 238. Discrimination Between White and Colored Passenger Unlawful.
- Sec. 239. Lower Rates to Settlers Unlawful.
- Sec. 240. Control of Commission over Preference in Mileage, Excursion and Commutation Passenger Tickets.
- Sec. 241. Legality of Sale of Tickets for Number of Persons at Less Rate Than for a Single Passenger—Party Rate Case.
- Sec. 242. But Party Rate Tickets Cannot be Limited to Particular Classes of Persons.

- Sec. 243. Distinction Between Wholesale Rates in Passenger and Freight Traffic.
- Sec. 244. Regulations Governing Commutation Tickets Must Not be Discriminative Between Classes of Persons.
- Sec. 245. Discrimination in Trans-Continental Passenger Fares as Affecting Intermediate Localities.

## CHAPTER XIII.

## FILING AND PUBLICATION OF INTERSTATE RATES, AND EFFECT THEREOF.

- Sec. 246. Publicity and Permanency of Rates and Charges of Common Carriers at Common Law.
- Sec. 247. Publication, Certainty and Stability of Rates Necessary to Eliminate Rebates and Discriminations.
- Sec. 248. The Act to Regulate Commerce on Publicity of Rates and Adherence Thereto.
- Sec. 249. Purpose of Congress in the Passage of the Provisions of Section 6 of the Act.
- Sec. 250. Publication and Filing of all Rates, Fares and Charges for Interstate Transportation Mandatory.
- Sec. 251. Necessary Steps to Put Rates Legally in Force—Posting not Essential.
- Sec. 252. What the Schedules of Rates, Fares and Charges Filed with the Commission Must Contain.
- Sec. 253. Privileges or Facilities Furnished Shippers and Not Specified in Tariffs Unlawful.
- Sec. 254. Regulations Concerning Baggage of Interstate Passengers Must be Published.
- Sec. 255. Demurrage Charges on Interstate Shipments Must be Filed with Commission.
- Sec. 256. No Changes in Rates, Fares and Charges Permitted Without Thirty Days Notice to the Commission.
- Sec. 257. Carriers Prohibited from Departing to any Extent from Published Schedules of Rates and Charges Filed With Commission.
- Sec. 258. Foregoing Rule Equally Applicable to Transit and Special Services Provided in Tariffs.
- Sec. 259. Forwarders are Shippers within Statute Prohibiting Refunds from Published Rates and Charges.
- Sec. 260. Oral Contracts or Special Arrangements for Interstate Transportation Contravening Published Schedules, Unlawful.
- Sec. 261. Shippers and Passengers Conclusively Presumed to Have Knowledge of Published Schedules of Rates, Fares and Charges.
- Sec. 262. Courts Bound by Published Rates and Charges Until Set Aside by Commission.
- Sec. 263. Carriers Must Collect the Scheduled Rates and Charges for Interstate Transportation.

- Sec. 264. Illustrative Cases Wherein the Foregoing Rule was Applied and Enforced.
- Sec. 265. Defense of Estoppel to Actions Against Shippers for Undercharges.
- Sec. 266. Penalty for Making Erroneous Quotation of Rate When Shipper is Damaged Thereby.
- Sec. 267. In Actions to Collect Scheduled Rates Counterclaims for Damages to Goods Prohibited.
- Sec. 268. Damages Not Recoverable for Failure to Post Rates at Stations.
- Sec. 269. Rule Stated in Foregoing Paragraph Illustrated in Adjudicated Cases.
- Sec. 270. Shipper May Recover Damages for Collection of Rate in Excess of that Fixed by Schedule.
- Sec. 271. Nothing but Money May be Lawfully Received for Transportation of Either Passengers or Property.
- Sec. 272. Acceptance of Promissory Notes in Payment for Freight Charges Unlawful.
- Sec. 273. Separately Established Rates must be Published in Absence of Joint Rates over Through Route.
- Sec. 274. When Through Rate is Made up of Sum of Locals, Rates in Effect on Date of Shipment Apply.
- Sec. 275. Departures from Published Tariffs Permitted in Performance of Private Duties of Carriers.
- Sec. 276. Rates for Passage of Vehicles on Railroad Ferries Must be Filed.

#### CHAPTER XIV.

#### DAMAGES OR REPARATION FOR VIOLATIONS OF COMMERCE ACT—JURISDICTION OF COURTS AND COMMISSION.

- Sec. 277. Statutory Provision Creating Civil Liability for Damages Due to Violation of Interstate Commerce Act.
- Sec. 278. Statutory Authority of Commission and Courts to Award Damages for Violation of Act.
- Sec. 279. Commission Without Authority to Award Damages Prior to Amendment of 1889.
- Sec. 280. Award of Damages by Commission for Unlawful Discrimination—Former and Present Rule.
- Sec. 281. Authority of Commission to Award Damages Extends Only to Violations of Act to Regulate Commerce.
- Sec. 282. Conflicting Provisions Harmonized and Exclusiveness of Remedy before Commission, in Certain Cases, Established.
- Sec. 283. Courts Without Primary Jurisdiction to Award Damages for Exaction of Excessive Interstate Rates.
- Sec. 284. But Actions for Overcharges Exceeding Scheduled Rates may be Prosecuted in Courts without Previous Determination of Commission.

- Sec. 285. Suits for Damages Recoverable Under Section 8 Cannot be Prosecuted in State Courts.
- Sec. 286. Damages Caused by Unjust Discrimination, Preliminary Order of Commission Essential, When.
- Sec. 287. Original Jurisdiction of State Courts to Award Damages Against Interstate Carriers not Wholly Superseded.
- Sec. 288. In Actions for Damages for Violation of Statute Pecuniary Loss Must be Shown.
- Sec. 289. Measure of Damages for Unreasonable Rates and Unlawful Discriminations.
- Sec. 290. Parties Entitled to Damages for Excessive Freight Charges—Consignors and Consignees.
- Sec. 291. Right of Shipper to Reparation When Arbitrary Sum is Added to Sale Price to Cover Excessive Charges.
- Sec. 292. Foregoing Principle Approved by Federal Supreme Court—Southern P. Co. v. Darnell-Taenzer Lumber Co.
- Sec. 293. Reparation on Past Shipments not Automatically Awarded on Finding that Rate is Excessive.
- Sec. 294. Damages Growing out of Inadequate Service or Facilities.
- Sec. 295. Damages for Misrouting Shipments May be Awarded by Commission, When.
- Sec. 296. Reparation Awarded by Commission for Overcharges a Bar to Subsequent Action for Additional Damages.
- Sec. 297. Findings of Commission on Reasonableness of Rates Inure to Benefit of Every Person Paying the Unjust Rate.
- Sec. 298. Findings of Fact Required When Commission Awards Damages Against a Carrier.
- Sec. 299. Statute Prescribing Findings and Orders of Commission Prima Facie Evidence of Facts Therein Stated, Constitutional.
- Sec. 300. Commission May Order Reparation without Prescribing Maximum Rate to be Observed in the Future.
- Sec. 301. Actions to Enforce Orders of Commission Awarding Damages may be Prosecuted in State as well as Federal Courts.
- Sec. 302. Complaints for Damages before Commission must be Filed within Two Years.
- Sec. 303. Assignability of Claims for Damages under the Interstate Commerce Act.
- Sec. 304. Allowance of Attorney's Fees for Services in Reparation Cases Before Commission not Permitted.

## CHAPTER XV.

## LIABILITIES FOR LOSS AND DAMAGE TO INTERSTATE SHIPMENTS—CARMACK AMENDMENT.

- Sec. 305. Initial Carriers Liable for Loss and Damage to Property Moving in Interstate Commerce.
- Sec. 306. Constitutionality and Validity of the Carmack Amendment.  
2 Common Carriers B.

- Sec. 307. Law Governing Duties of Carriers for Loss or Damage to Interstate Shipments Prior to 1906.
- Sec. 308. Purpose of Congress in the Enactment of the Carmack Amendment.
- Sec. 309. Stipulations Exempting Initial Carrier from Liability for Loss and Damage on Connecting Lines Invalid.
- Sec. 310. All State Laws and Rules Regulating Liabilities for Loss and Damage, Superseded as to Interstate Shipments.
- Sec. 311. Decisions of Federal Courts Control in Construing Carmack Amendment.
- Sec. 312. State Courts may Enforce Provisions of Carmack Amendment and Award Damages Thereunder.
- Sec. 313. Actions Brought in State Courts under Carmack Amendment not Removable, When.
- Sec. 314. Initial Carrier may not be Sued in Domicile of Terminal Carrier.
- Sec. 315. Receipt from Shipper of Money Paid by Initial Carrier Binding upon Connecting Carrier in Absence of Fraud.
- Sec. 316. Recovery Against Initial Carrier Bars an Action Against Connecting Carriers.

#### CHAPTER XVI.

##### THE CARMACK AMENDMENT AS MODIFIED BY FIRST AND SECOND CUMMINS AMENDMENTS.

- Sec. 317. Text of the Carmack Amendment as Modified by First and Second Cummins Amendments.
- Sec. 318. Causes Leading to Enactment of First Cummins Amendment —Agreed Valuation Clauses and Notices of Loss.
- Sec. 319. Effect of Second Amendment upon Provisions of First Cummins Amendment.
- Sec. 320. Object and Purpose of Congress in Enacting Second Cummins Amendment of 1916.
- Sec. 321. Cummins Amendment has no Retroactive Effect.
- Sec. 322. Initial Carriers Subject to the Statute as Changed by Cummins Amendment.
- Sec. 323. Interurban Electric Railroad Subject to Statute, When.
- Sec. 324. Carriers Liable for Full Actual Loss, Damage or Injury to Ordinary Live Stock.
- Sec. 325. Limitations of Liability Valid as to Property Other Than Live Stock, When.
- Sec. 326. Stipulations as to Notice of Claims and Limitations upon Filing of Suits Now Regulated by Statute.
- Sec. 327. Statute not Applicable to Export and Import Shipments to and from Countries not Adjacent to United States.

## CHAPTER XVII.

BASIS, NATURE AND EXTENT OF LIABILITY UNDER CARMACK  
AMENDMENT AS AMENDED.

- Ses. 328. Liability Imposed by the Statute is that of Common Law Doctrines Governing Duties of Carriers.
- Sec. 329. Ancient Common Law and Modern Exceptions to Liabilities of Common Carriers.
- Sec. 330. Interstate Carriers may Contract Against Loss by Fire not Due to Negligence.
- Sec. 330a. Stipulations Exonerating Carrier from its Own Negligence Invalid Though Filed with Commission.
- Sec. 331. Proviso Reserving all Remedies under Existing Laws Relates Solely to Remedies under Federal Laws.
- Sec. 332. Duties and Obligations of Initial Carrier Commence with Delivery of Property for Transportation.
- Sec. 333. Effect of Failure or Refusal of Initial Carrier to Issue Bill of Lading.
- Sec. 334. Term "Lawful Holder" of Bill of Lading not Limited to Owner of Property Transported.
- Sec. 335. Bill of Lading Issued by Initial Carrier Governs Entire Transportation—Second Bill Void.
- Sec. 336. Statute Embraces Damages due to Delay as Well as for Loss or Injury in Course of Transportation.
- Sec. 337. Wrongful Delivery by a Terminal Carrier a "Loss" Within Meaning of Statute.
- Sec. 338. Initial Carriers Liable for Property Held by Terminal Carrier as Warehouseman—Conflicting Decisions.
- Sec. 339. Nature of Carrier's Liability as Warehouseman.
- Sec. 340. Quantum of Proof Necessary to Establish Liability under Federal Statute.
- Sec. 341. Federal Rule as to Negligent Delay Co-operating with Act of God in Destruction of Property.
- Sec. 342. Connecting and Terminal Carriers Liable Under Carmack Amendment as Amended, When.
- Sec. 343. Connecting and Terminal Carriers not Liable for Acts of Initial Carrier.
- Sec. 344. Presumption that Loss or Damage Occurred on Line of Terminal Carrier—Contrary Rulings.
- Sec. 345. Last Carrier not Liable in Absence of Proof of Damage on its Line.
- Sec. 346. Effect of Re-routing or Change of Destination upon Liability of Initial Carrier.
- Sec. 347. Carriers May Limit Liability for Value of Property at Time and Place of Shipment.
- Sec. 348. Provisions of Shipper's Contract with Initial Carrier Inure to Benefit of Connecting Carrier.



## CHAPTER XVIII.

## THE FEDERAL BILL OF LADING LAW.

- Sec. 349. Origin and General Scope of the Federal Bill of Lading Law.
- Sec. 350. Constitutionality and Validity of the Act.
- Sec. 351. Leading Provisions of Act—Rule in *Friedlander v. Texas & Pacific R. Co.*, Modified.

## CHAPTER XIX.

THE INTERSTATE COMMERCE COMMISSION—ITS NATURE,  
FUNCTIONS, POWERS AND DUTIES.

- Sec. 352. Necessity of a National Commission to Enforce Federal Legislation Regulating Railroads.
- Sec. 353. Statutory Provision Creating the Interstate Commerce Commission.
- Sec. 354. Amendments of 1906 and 1917 Increasing Membership and Salaries of the Commissioners.
- Sec. 355. Commission an Administrative Body Exercising Quasi Judicial Functions.
- Sec. 356. General Statement of Powers and Duties of Commission over Interstate Carriers.
- Sec. 357. Commission Authorized to Divide its Members into Divisions.
- Sec. 358. Three Divisions of Commission Established Pursuant to Foregoing Amendment.
- Sec. 359. Limitation upon Powers of Commission in Regulating Interstate Carriers and Transportation.
- Sec. 360. Commission Without Authority to Compel Carriers to Acquire and Furnish Special Kind of Cars.
- Sec. 361. Duty to Furnish Cars for Interstate Shipments a Judicial Question for Courts and not Administrative in Character.
- Sec. 362. Maximum Rates and Charges for Interstate Transportation may be Prescribed by Commission.
- Sec. 363. Proposed Advances in Rates may be Suspended by Commission Pending Investigation of Propriety.
- Sec. 364. Amendment of 1917 Prohibiting Filing of Increased Rates without Approval of Commission.
- Sec. 365. Rules of Carriers Governing Distribution, Exchange, Interchange and Return of Cars.
- Sec. 366. Statute Compelling Carriers to Establish Through Routes and Joint Rates upon Order of Commission, Valid.
- Sec. 367. Powers of, and Limitations Upon, Commission in Establishing Through Routes and Joint Rates.
- Sec. 368. When Commission may Establish Through Routes and Maximum Joint Rates between Rail and Water Lines.
- Sec. 369. Jurisdiction of Commission in Connection with Transportation to Adjacent Foreign Countries.

- Sec. 370. Commission may not Compel a Carrier to Receive and Switch Carload Freight to Industries on its Terminals.
- Sec. 371. Commission may Authorize Carriers to Charge Less for Longer than for Shorter Distance.
- Sec. 372. Commission may Authorize Rail Carriers to Continue Ownership of Water Lines.
- Sec. 373. Commission may Prescribe the Forms of all Schedules of Rates and Charges.
- Sec. 374. Charges by Shippers against Carriers for Services Connected with Transportation under Control of Commission.
- Sec. 375. Commission may Formulate Regulations for the Transportation of Explosives.
- Sec. 376. Switch Connections may be Ordered by the Commission, When.
- Sec. 377. Forms of all Accounts, Records and Memoranda of Carriers Subject to Control of Commission.
- Sec. 378. Power of Commission over Rail Carriers Discriminating against Steamship Lines to Foreign Countries.
- Sec. 379. Rail Rates Reduced to Meet Water Competition may not be Raised without Permission of Commission.
- Sec. 380. Physical Connection between Line of Rail Carriers and Water Carriers may be Established by Commission.
- Sec. 381. Maximum Proportional Rates by Rail to and From Ports may be Established by Commission, When.
- Sec. 382. Commission Without Jurisdiction to Regulate Charges in Connection with 28-Hour Livestock Law.
- Sec. 383. Commission Required to Make Annual Reports to Congress.
- Sec. 384. Rules and Regulations for Inspection of Locomotive Boilers Controlled by Commission.
- Sec. 385. Carriers Required to Make Monthly Reports of all Accidents to Commission.
- Sec. 386. Commission May Require Annual Reports from all Common Carriers Subject to Statute.
- Sec. 387. Power of Commission over Safety Appliances on Railroad Cars and Engines.
- Sec. 388. Commission Empowered to Investigate Railroad Accidents to Make Reports.

## CHAPTER XX.

### PROCEDURE BEFORE INTERSTATE COMMERCE COMMISSION.

- Sec. 389. Who May Make Complaints to the Commission.
- Sec. 390. Absence of Direct Damage to Complainant not Ground for Dismissal of Complaint.
- Sec. 391. Power of Commission to Proceed when Acting upon its Own Motion.
- Sec. 392. Power of Commission to Formulate Rules of Procedure.
- Sec. 393. Rules Governing Complaints Filed Before Commission.
- Sec. 394. Essentials of Complaints When Reparation is Sought.

- Sec. 395. Formal Claims for Reparation Based upon Findings of Commission.
- Sec. 396. Specifications of Complaints, Answers, Briefs, Petitions, Applications, etc.
- Sec. 397. Applications to Carriers Under Fourth Section.
- Sec. 398. Suspensions of Tariff Schedules under Section 15.
- Sec. 399. Requirements of the Rules as to Answers Filed Before Commission.
- Sec. 400. Method of Serving Papers.
- Sec. 401. Amendments to Complaints or Answers in Proceedings Before Commission.
- Sec. 402. Commission May Order Testimony to be Taken by Deposition at any Stage of Proceedings.
- Sec. 403. Method of Hearing Before the Commission.
- Sec. 404. May Hold Hearings or Prosecute Inquiries Anywhere in the United States.
- Sec. 405. Continuances, Extensions of Time and Stipulations.
- Sec. 406. Commission may Compel Attendance and Testimony of Witnesses and Production of Papers.
- Sec. 407. Schedules, Contracts and Annual Reports Filed with Commission—Public Records Receivable as Prima Facie Evidence, When.
- Sec. 408. Transcripts of Testimony to be Furnished Complainant and Defendant.
- Sec. 409. Rules Governing Filing of Briefs.
- Sec. 410. Orders of the Commission—Enforcement, Service of, and Duties of Carriers Thereunder.
- Sec. 411. Applications for Rehearing or Reopening before the Commission—Procedure.
- Sec. 412. Employment of Attorneys to Aid Commission Authorized.

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### PART THREE

#### PERSONAL INJURIES TO INTERSTATE EMPLOYEES OF COMMON CARRIERS.

##### The Federal Employers' Liability Act.

#### CHAPTER XXI.

##### SCOPE, PURPOSE, VALIDITY AND EFFECT OF FEDERAL LIABILITY ACT.

- Sec. 413. Source, Nature and Extent of Power of Congress to Regulate Relation of Master and Servant.
- Sec. 414. Employers' Liability Act of 1906 Invalid.
- Sec. 415. Second Federal Employers' Liability Act Valid.
- Sec. 416. Scope of the Federal Employers' Liability Act.

- Sec. 417. Purpose of Congress in Enactment of Federal Act—Uniformity and Modification of Common Law Rules.
- Sec. 418. Defects in Act of 1908 and Amendments of 1910.
- Sec. 419. Congressional Purpose in the Enactment of the Amendments of 1910.
- Sec. 420. Extent of Power Exercised by Congress in Passing the Liability Act.
- Sec. 421. Exclusiveness of the Federal Act and its Effect upon State Laws.
- Sec. 422. State Workmen's Compensation Laws Superseded by Federal Act as to Injuries Arising in Interstate Commerce.
- Sec. 423. Common Law Right of Parents to Recover for Loss of Service of Minor Employee Injured, Superseded.
- Sec. 424. Remedy Provided by Statute Limited to Employees Only of Common Carriers by Railroad.
- Sec. 425. Employees on Ocean-going Ships Owned by Common Carriers by Railroads not Included.
- Sec. 426. Decisions of National Courts Construing Act Control.
- Sec. 427. Laws of State Control as to Procedure.
- Sec. 428. Fellow Servant Rule Abolished as to all Interstate Employees.

## CHAPTER XXII.

## CARRIERS SUBJECT TO LIABILITY ACT.

- Sec. 429. General Rule as to When Railroad Companies are Engaged in Interstate and Foreign Commerce.
- Sec. 430. Railroads Within the Act Defined—Spur Tracks.
- Sec. 431. Railroad Must be a Common Carrier—Tap Lines and Logging Roads.
- Sec. 432. Carriers Owning and Operating Lines Wholly Within a Single State Subject to Federal Act, When.
- Sec. 433. Railroad Carriers Engaged in Foreign Commerce Subject to the Statute.
- Sec. 434. Lessor of Railroad Engaged in Interstate Commerce Liable, When.
- Sec. 435. Interurban Electric Railroads Included Within the Act.
- Sec. 436. Railroads Carrying Passengers and no Freight.
- Sec. 437. Ships or Vessels not a Part of a Railroad System.
- Sec. 438. Street Railroads not Within the Terms of the National Act.
- Sec. 439. Receivers of Railroad Corporations Included Within the Act.
- Sec. 440. Sleeping Car Companies not Common Carriers by Railroad.
- Sec. 441. Express Companies not Common Carriers by Railroad Under Federal Act.
- Sec. 442. All Carriers by Railroad and all their Employees Within Territories Included.
- Sec. 443. Beginning and Ending of Interstate Character of Shipments.
- Sec. 444. Hauling Empty Cars or Company Property over State Line.
- Sec. 445. Transportation from Point to Point in One State Passing Through Another State in Transit.

- Sec. 446. When Reshipment from Point of Delivery Changes Interstate Character of Traffic.
- Sec. 447. When Reshipment from Point of Delivery Does not Change Interstate Character of Traffic.
- Sec. 448. Proof that Injured Servant is Employed in Interstate Commerce Sufficient to show that the Railroad is so Engaged.

## CHAPTER XXIII.

## EMPLOYEES ENGAGED IN INTERSTATE COMMERCE—GENERAL PRINCIPLES.

- Sec. 449. Statute Includes Only Employees Injured While Engaged in Interstate Commerce.
- Sec. 450. Employment in Interstate Commerce not Restricted or Limited to Actual Transportation from One State to Another.
- Sec. 451. Same Act May Constitute Interstate Employment in One Relation and not in Another.
- Sec. 452. Criterion Adopted by United States Supreme Court in Determining Employment in Interstate Commerce.
- Sec. 453. Employees Presumed to be Engaged in Intrastate Commerce.
- Sec. 454. Prior or Subsequent Employment Immaterial in Determining Applicability of Federal Statute.
- Sec. 455. Servants Employed in Both Intrastate and Interstate Commerce.
- Sec. 456. Employees on Premises of Railroad Company Going to or from Work.
- Sec. 457. Status of Employees Injured While Going to or from Day's Work Partly in Interstate and Partly in State Commerce.
- Sec. 458. Employer not Liable to Employee Injured After Day's Work is Over—Sleeping in Cars.
- Sec. 459. Effect of Temporary Cessation in or Abandonment of Work in Interstate Commerce.
- Sec. 460. Employees of Private Carriers Transporting their Own Property not Subject to Statute.
- Sec. 461. When Questions of Employment in Interstate Commerce should be Submitted to Jury.
- Sec. 462. Decisions Construing Federal Safety Appliance Act not always Applicable in Construing Employers' Liability Act.
- Sec. 463. Instances where Employees were Engaged in Interstate Commerce but Erroneously Held to Have Been Engaged in Intrastate Commerce.
- Sec. 464. Instances Where Employees Were Engaged Exclusively in Intrastate Commerce but Erroneously Held to have been Engaged in Interstate Commerce.
- Sec. 465. Burden of Proving Interstate Employment is Upon the Plaintiff.
- Sec. 466. Burden of Proving Interstate Employment upon Defendant, When.

## CHAPTER XXIV.

## EMPLOYEES ENGAGED IN CONSTRUCTION AND REPAIR WORK.

- Sec. 467. Employees Engaged in Construction of Instrumentalities for Future Use in Interstate Commerce.
- Sec. 468. Distinction between Original Construction Work and Repair or Maintenance of Interstate Highways by Rail.
- Sec. 469. Bridge Workers and Carpenters Employed in Interstate Commerce, When.
- Sec. 470. Far Reaching Effect of Pedersen Case in Extending National Control over Railroad Employees.
- Sec. 471. Erecting Foundation for New Bridges under Old Bridges Forming Parts of Interstate Lines.
- Sec. 472. Removing Bolts from Timbers after Having Been Taken Out of Interstate Bridges.
- Sec. 473. Repairing Tracks of Interstate Carriers—Section men and Track Laborers.
- Sec. 474. Status of Laborers Repairing Side Tracks, Spur Tracks and Switches.
- Sec. 475. Maintenance and Repair of Turntables on Interstate Railroads.
- Sec. 476. Clearing Debris from Interstate Lines after Wrecks and Constructing Temporary Tracks.
- Sec. 477. Employees Surveying Track to Improve Condition of Roadbed.
- Sec. 478. Employees Handling Rails on Tracks of Interstate Carriers.
- Sec. 479. Picking up Old Rails and Storing New Ones Along Track for Future Use.
- Sec. 480. When Laborers Handling Ties for Common Carriers are Under the Federal Act.
- Sec. 481. Employees Handling Ballast, Gravel, Sand, Etc., for Use in Repairing Interstate Tracks.
- Sec. 482. Excavating and Deepening Ditches Along Railroad Tracks for Drainage Purposes.
- Sec. 483. Repairing or Rebuilding Depots, Roundhouses, Sheds, etc., not Employment in Interstate Commerce.
- Sec. 484. Employees Working in Machine and Repair Shops, Roundhouses and Other Like Buildings.
- Sec. 485. Earlier Decisions Overruled by Rulings of National Supreme Court Cited in Two Foregoing Paragraphs.
- Sec. 486. When Car and Engine Repairers are Employed in Interstate Commerce.
- Sec. 487. Employees Repairing Engines and Cars in Transit or Temporarily Delayed.
- Sec. 488. Statutes of Shopmen Repairing Empty Cars in Terminal Yards and Engines in Roundhouses.
- Sec. 489. Subsequent Cases Applying the Doctrine of the Winters Case to Car and Engine Repairers.

- Sec. 490. Differentiating Factors Between Rulings in Winters and Pedersen Cases.
- Sec. 491. Illustrative Cases in which Car and Engine Repairers were not Employed in Interstate Commerce.
- Sec. 492. Repairing Cars and Engines Used Exclusively in Interstate Commerce.
- Sec. 493. Interstate Status of Employes Painting Instrumentalities of Commerce Among the States.
- Sec. 494. Linemen Repairing Telegraph and Telephone Lines of Interstate Carriers.

## CHAPTER XXV.

## INTERSTATE STATUS OF TRAIN AND SWITCHING CREWS.

- Sec. 495. Train Men on Interstate Trains are Employed in Interstate Commerce.
- Sec. 496. When Trainmen are not Engaged in Interstate Commerce.
- Sec. 497. Employes Preparing Interstate Trains for Movement.
- Sec. 498. Beginning and Termination of Federal Control over Crews on Trains Carrying Interstate Commerce.
- Sec. 499. Interstate Employment of Train Crews on Return Trip not Shown by Proof that Train on Outgoing Trip Carried Interstate Freight.
- Sec. 500. Train and Switching Crews "Making Up" and "Breaking Up" Interstate Trains in Railroad Yards.
- Sec. 501. Switching Cars Containing Intrastate Shipments into or out of Interstate Trains—Early Conflicting Rulings.
- Sec. 502. Status of Such Employes Finally Held to be Under Federal Control.
- Sec. 503. Test in Determining when Switching Crews are Employed in Interstate Commerce.
- Sec. 504. Doctrine of Behrens Case as to Interstate Status of Switching Crews Reaffirmed and Applied.
- Sec. 505. Exceptions to Rule that Switching Crews Moving Intrastate Cars Exclusively are Governed by State Law.
- Sec. 506. Switching Movements of Empty Cars in Railroad Yards to be Loaded with Interstate Freight.
- Sec. 507. Weighing of Cars containing Interstate Freight after Unloading to Determine Weight of Contents.
- Sec. 508. Switching Movement of Cars After Termination of Interstate Journey or After Receipt by Consignee.
- Sec. 509. Switching Cars Loaded with Interstate Freight for Repairs.
- Sec. 510. Local Movement of Cars in Yard Between Completion of one Interstate Trip and Commencement of Another.
- Sec. 511. Exceptions to Rule that Delivery of Cars at Destination ends its Interstate Status.
- Sec. 512. Switching Movement of Car of Lumber to be Used in Repairing the Building Cars Used in Interstate Commerce.



Sec. 513. Employees Making up Train of Another Company for an In-state Run over the Latter's Track.

Sec. 514. Illustrative Cases Showing Employment of Switching Crews in Interstate Commerce.

#### CHAPTER XXVI.

##### INTERSTATE STATUS OF MISCELLANEOUS EMPLOYEES.

Sec. 515. Employees Procuring Supplies and Materials to be Used on Interstate Trains.

Sec. 516. Supplying and Moving Coal for Use of Engines Pulling Interstate Trains.

Sec. 517. Status of Employees Dumping Coal from Chutes into Tenders of Interstate Engines.

Sec. 518. Loading and Unloading Freight from Interstate Trains Constitutes Work in Interstate Commerce.

Sec. 519. Status of Watchmen, Detectives and other Employees doing Police Duties.

Sec. 520. Yard Clerks Engaged in Interstate Commerce, When.

Sec. 521. Servants of Railroad Companies Handling United States Mail in Connection with Interstate Trains.

Sec. 522. Agents of Express Companies.

Sec. 523. Interstate Status of Express Messengers Employed Jointly by Railroad and Express Companies.

Sec. 524. Pullman Employees.

Sec. 525. Miscellaneous Employees.

#### CHAPTER XXVII.

##### NEGLIGENCE UNDER FEDERAL ACT.

Sec. 526. The Statutory Provision.

Sec. 527. Two Branches of Negligence Under First Section.

Sec. 528. Negligence Criterion of Liability of Carrier Under National Statute.

Sec. 529. Negligence need not be Proven when Violation of Safety Appliance Act is Cause of Injury.

Sec. 530. Negligence of Human Agencies Not Limited to Fellow Servants as Construed under Common Law.

Sec. 531. Negligence of Common Carrier Need Not be Shown by Direct or Positive Proof.

Sec. 532. Judicial Definition of Negligence.

Sec. 533. Carrier not Required to Furnish Latest, Best and Safest Appliances for Interstate Employees.

Sec. 534. Custom or Practice of Other Railroads not Conclusive in Determining Exercise of Ordinary Care.

Sec. 535. Decisions of National Courts Control in Determining Negligence—Contrary Rulings.

Sec. 536. Conflicting Rulings Finally Eliminated by Controlling Decisions of National Supreme Court.

Sec. 537. Negligent Act Must have been Committed while Employee was Acting within Scope of Employment.

- Sec. 538. Negligence Must be Proximate Cause of Injury.
- Sec. 539. Meaning of the Phrase "In Whole or in Part."
- Sec. 540. State Statutes Creating Presumption of Negligence from Injury Inapplicable to Interstate Employes.
- Sec. 541. Mississippi "Prima Facie" Statute Held Applicable to Actions under Federal Act.
- Sec. 542. Sufficiency of Evidence of Negligence to Submit Cause to Jury not Governed by Decisions of State Courts.
- Sec. 543. Effect of State Law Prohibiting Employment of Minors in Determining Negligence.
- Sec. 544. Applicability of Rule of Res Ipsa Loquitur to Actions under Federal Act—Conflicting Rulings.
- Sec. 545. Recovery Cannot be Defeated When Defendant's Negligence is Part of Causation.
- Sec. 546. Casualties Due to Sole Negligence of Employee, no Recovery under Federal Act.
- Sec. 547. Foregoing Principle Further Illustrated and Applied.
- Sec. 548. Cases Under Federal Act in Which the Facts were Held to Show Actionable Negligence.
- Sec. 549. Cases Under Federal Act in Which the Facts were Held not to Show Actionable Negligence.
- Sec. 550. Statute Covers Acts of Intrastate Employes and Defects in Instrumentalities Used Solely in Intrastate Commerce.
- Sec. 551. Intrastate Employes Injured by Negligence of Interstate Employes or Instrumentalities of Interstate Commerce have no Remedy under Federal Act.
- Sec. 552. Willful Wrongs not Within Terms of Act.

#### CHAPTER XXVIII.

##### ASSUMPTION OF RISK UNDER LIABILITY ACT.

- Sec. 553. The Statutory Provision.
- Sec. 554. Assumption of Risk a Defense under the Federal Act.
- Sec. 555. Doctrine of Horton Case Reexamined and Reaffirmed by National Supreme Court.
- Sec. 556. Effect of State Constitutions and Statutes Abolishing or Modifying Assumption of Risk on Interstate Employes.
- Sec. 557. Decisions of Federal Courts Control in Determining When Employee Assumes Risk.
- Sec. 558. Ordinary Risks and Known or Obvious Extraordinary Risks Assumed by Interstate Employees.
- Sec. 559. Exception to Rule that Servant Assumes Obvious or Known Risk—Promises of Repair.
- Sec. 560. When Assumption of Risk is a Defense to Negligent Acts of Fellow Servants.
- Sec. 561. Analysis of Federal Decisions Applying Doctrine of Assumption of Risk to Interstate Employes of Railroads.
- Sec. 562. Distinction Between Assumption of Risk and Contributory Negligence.

- Sec. 563. When Assumption of Risk is not a Defense—Federal Safety Appliance Laws.
- Sec. 564. State Statutes for Safety of Employes not Included.
- Sec. 565. Assumption of Risk Eliminated in Actions for Violation of Hours of Service Act.
- Sec. 566. Confusing Assumption of Risk with Contributory Negligence in Jury Instructions under Federal Act.
- Sec. 567. When Assumption of Risk is no Defense When there is a Plurality of Causes.
- Sec. 568. Violations of Rules not Assumption of Risk.
- Sec. 569. Concrete Instruction must be Given, if Requested.
- Sec. 570. Failure to Instruct on Assumption of Risk not Error When Defendant has not been Prejudiced Thereby.
- Sec. 571. Burden of Proving Assumption of Risk upon Defendant.
- Sec. 572. Defense of Assumption of Risk Must be Pleaded to be Available.
- Sec. 573. Cases in Which Interstate Employes were Held to have Assumed the Risk.
- Sec. 574. Cases in Which Interstate Employes were Held not to have Assumed the Risk.

## CHAPTER XXIX.

## CONTRIBUTORY NEGLIGENCE UNDER LIABILITY ACT.

- Sec. 575. The Statutory Provision.
- Sec. 576. Contributory Negligence Defined.
- Sec. 577. Right of Recovery under Federal Act not Barred by Contributory Negligence.
- Sec. 578. Two Theories of Comparative Negligence Extant in United States.
- Sec. 579. Purpose of Congress in Modifying Common Law Rule of Contributory Negligence.
- Sec. 580. Apportionment of Damages under Federal Act Different from Georgia Statute.
- Sec. 581. Employe's Contributory Negligence to Reduce Damages must Proximately Contribute to Injury.
- Sec. 582. Gross Negligence of Plaintiff and Slight Negligence of Defendant Cannot Defeat Recovery.
- Sec. 583. When Defendant's Act is no Part of Causation, Plaintiff Cannot Recover.
- Sec. 584. How Damages Apportioned When Employe is Guilty of Contributory Negligence.
- Sec. 585. When Duty of Trial Court to Instruct on Contributory Negligence Arises under Federal Act.
- Sec. 586. Method of Instructing the Jury When there is Evidence of Contributory Negligence.
- Sec. 587. Instruction on Contributory Negligence in Language of Statute not Erroneous.
- Sec. 588. Erroneous Instructions on Contributory Negligence Under the Federal Act.

- Sec. 589. When Contributory Negligence of Employee Does not Diminish Damages—Federal Safety Appliance Laws.
- Sec. 590. Burden is Upon Defendant to Prove Contributory Negligence.
- Sec. 591. Whether Contributory Negligence Must be Plead, Determined by State Law.
- Sec. 592. Evidence of Contributory Negligence Admissible Under General Denial, When.

## CHAPTER XXX.

## BENEFICIARIES UNDER LIABILITY ACT.

- Sec. 593. Beneficiaries under the Federal Statute.
- Sec. 594. Parents not Entitled to Damages when there is a Widow or Children.
- Sec. 595. Alien Dependents Residing Abroad may Recover under Federal Act.
- Sec. 596. Existence of Beneficiaries Named in Statute Jurisdictional.
- Sec. 597. Who are "Next of Kin" under Federal Act must be Determined by State Law.
- Sec. 598. Illegitimate Children may be Next of Kin within Meaning of Federal Statute.

## VOLUME II.

## PART THREE—CONTINUED.

## CHAPTER XXXI.

## DAMAGES IN DEATH CASES UNDER LIABILITY ACT.

- Sec. 599. The Statute.
- Sec. 600. No recovery under Federal Act unless Relatives Named in Statute Suffer Pecuniary Loss.
- Sec. 601. If Injured Employee Lives an Appreciable Length of Time, Beneficiaries May Also Recover Under 1910 Amendment.
- Sec. 602. Damages Under Section 9 Limited to Loss and Suffering While Deceased Employee Lived.
- Sec. 603. Loss of Future Earnings of Decedent not Included in Damages Due Beneficiaries Under Section 9.
- Sec. 604. No Recovery for Pain and Suffering of Deceased by Beneficiaries Prior to 1910 Amendment.
- Sec. 605. No Recovery of Damages under Section 9 when Death of Employee is Instantaneous.
- Sec. 606. Death Must be Result of Negligence before Beneficiaries can Recover under Section 1, but not under Section 9.
- Sec. 607. Decisions of National Courts on Measure of Damages Control.
- Sec. 608. Measure of Damages in Cases of Death under Section One of the Federal Act.

- Sec. 609. Damages Due Beneficiaries for Loss of Future Benefits Limited to Present Cash Value.
- Sec. 610. Subsequent Application of Doctrine of Kelly Case in State Courts.
- Sec. 611. Statutory Action is not for the Equal Benefit of each of the Surviving Beneficiaries.
- Sec. 612. Pecuniary Loss not Dependent upon any Legal Liability of the Employee to the Beneficiaries.
- Sec. 613. Distribution of Amount Recovered Controlled by Federal Statute and not State Laws.
- Sec. 614. Method of Apportioning Fund Among Beneficiaries upon a Lump Sum Settlement.
- Sec. 615. No Presumption of Damage to Widow and Child.
- Sec. 616. Effect of Abandonment by Husband on Right of Widow and Child to Recover.
- Sec. 617. Loss of Society, Companionship and Wounded Affections not Elements of Damages.
- Sec. 618. Loss of Care, Counsel, Training and Education of Minors Proper Elements of Damages.
- Sec. 619. Damages for the Estate of Decedent not Recoverable.
- Sec. 620. Necessity of Evidence Showing Earnings Beneficiaries have been Deprived of.
- Sec. 621. Award of Exemplary Damages not Permissible as to Interstate Employees.
- Sec. 622. Funeral Expenses not Recoverable in Actions under the Federal Act.
- Sec. 623. Necessity of Showing Contributions during Lifetime of Decedent to Beneficiaries of First and Second Classes.
- Sec. 624. Illustrative Cases Involving Sufficiency of Proof to Establish Dependency.
- Sec. 625. Actual Dependency Either Total or Partial must be shown by Beneficiaries of Third Class.
- Sec. 626. What Constitutes Dependency as to Third Class Beneficiaries.
- Sec. 627. Proof of Occasional Gifts does not Create Dependency as to Beneficiaries of Third Class.
- Sec. 628. Cases Declaring the True Measure of Damages and Approved by the United States Supreme Court.
- Sec. 629. Erroneous Instructions on Measure of Damages under Federal Act.
- Sec. 630. Errorless Instructions on Measure of Damages under Federal Act.
- Sec. 631. Reference in Instructions on Measure of Damages to Sum Sued for, not Erroneous.
- Sec. 632. State Statutes Limiting Amounts Recoverable in Death Cases Inapplicable to Interstate Employees.
- Sec. 633. State Law Giving Earnings of Minor Son to Father Applicable in Determining Pecuniary Loss.
- Sec. 634. Effect of Excessive Apportionment to one Beneficiary.

- Sec. 635. Remittitur may Cure Error of Failure to Reduce Damages on Account of Contributory Negligence.
- Sec. 636. Propriety of Special Verdicts When Actions Involve Reduction of Damages Due to Contributory Negligence.
- Sec. 637. Settlement with One Beneficiary does not Defeat Action by a Personal Representative.
- Sec. 638. Damages Due Each Beneficiary May be Apportioned in the Verdict.

## CHAPTER XXXII.

## CONTRACTS FORBIDDEN BY LIABILITY ACT.

- Sec. 639. The Statutory Provision.
- Sec. 640. Statute Prohibiting Carriers from Evading Liability by Contracts or Regulations, Valid.
- Sec. 641. Statute Applies to Existing as Well as Future Contracts.
- Sec. 642. Acceptance of Benefits from Employer no Bar to Suit Against Joint Tort-Ffeasor.
- Sec. 643. Inhibition of Section 5 Limited to Employees of the Carrier.
- Ses. 644. Release of Cause of Action for Injury not a Contract Within Section 6.

## CHAPTER XXXIII.

## STATUTE OF LIMITATION.

- Sec. 645. Statutory Provision.
- Sec. 646. Institution of Suit Within Specified Time a Condition Precedent to Recovery.
- Sec. 647. Plea of Limitation not Required When Record Shows Filing of Suit after Lapse of Two Years.
- Sec. 648. Limitation Period may not be Avoided by Estoppel or Fraudulent Representations.
- Sec. 649. Insanity of Injured Employee Cannot Operate to Extend Time for Filing Suit.
- Sec. 650. When Cause of Action under Federal Act Accrues in Death Cases.
- Sec. 651. Time of Commencement of Action a Question of Procedure.
- Sec. 652. Error to Submit Question of Limitation to Jury When Facts Appear Without Dispute.

## CHAPTER XXXIV.

## JURISDICTION OF STATE AND FEDERAL COURTS.

- Sec. 653. Actions may be Brought in Federal Courts.
- Sec. 654. Suits under Federal Act may Also be Prosecuted in State Courts.
- Sec. 655. Causes Instituted in State Courts not Removable to Federal Courts.
- Sec. 656. Removability when Petition States Cause of Action under both State Law and Federal Act in Separate Courts.

- Sec. 657. Contrary Decisions by Other Federal Courts.
- Sec. 658. When Petition Does not State Cause of Action Under Federal Act Although so Intended.
- Sec. 659. Judgment of Highest State Court in Action under Federal Act may be Reviewed by United States Supreme Court, When.
- Sec. 660. Remedy by Writ of Error Excluded in Certain Cases by Amendatory Act of 1916.
- Sec. 661. Record must Show Right under Federal Laws was Specially Set up and Denied by State Court.
- Sec. 662. Contention that there is or is not Sufficient Evidence to Show Liability, Will Support Writ of Error.
- Sec. 663. Power to Review does not Extend to Questions Merely Incidental and Non-Federal in Character.
- Sec. 664. Ruling of State Court that Federal Question was Sufficiently Raised Binding upon United States Supreme Court.
- Sec. 665. Federal Questions to Support Writ of Error to United States Supreme Court, need not be Raised by the Pleadings.
- Sec. 666. Foregoing Rule Subsequently Qualified, Limited and Explained.
- Sec. 667. Pleading Federal Act and Submitting Case to Jury Under State Law, no Denial of Federal Right.
- Sec. 668. When Petition not Stating a Good Cause of Action under Federal Act Raises a Federal Question.
- Sec. 669. Claim that Verdict is Excessive not Reviewable by Writ of Error.
- Sec. 670. Pleading and Practice in State Courts Under Employers' Liability Statute not Federal Questions.
- Sec. 671. State Law Requiring Facts Showing Applicability of Federal Act to be Pleading no Denial of Federal Right.
- Sec. 672. Refusal of Trial Court to Take Case from Jury Will not be Disturbed by National Supreme Court Unless Palpably Erroneous.

## CHAPTER XXXV.

## PARTIES, PLAINTIFFS AND DEFENDANTS, IN ACTIONS UNDER LIABILITY ACT.

- Sec. 673. Personal Representative Only can Bring Suit in Case of Death.
  - Sec. 674. Widow Cannot Maintain Suit in Individual Capacity Although she May be Sole Beneficiary.
  - Sec. 675. Want of Legal Capacity in Widow to Sue Cannot be Waived.
  - Sec. 676. Ancillary Administrator may Sue Under the Federal Act.
  - Sec. 677. Personal Representative Alone may Revive Suit Commenced by Employee in his Lifetime.
  - Sec. 678. Existence of Other Property Not Necessary to Secure Appointment of Personal Representative.
- 2 Common Carriers C.

- Sec. 679. Agents and Servants Whose Negligence Caused Injury, not Liable under the Federal Act.
- Sec. 680. Lessor of a Railroad may be Made Party Defendant.
- Sec. 681. Personal Representative Appointed in One State Cannot Sue in Another State Without Consent.

## CHAPTER XXXVI.

## PLEADINGS UNDER LIABILITY ACT.

- Sec. 682. Plaintiff's Petition Must Plead Facts Showing That Injury or Death Occurred under Conditions Described in Federal Act.
- Sec. 683. If Petition States Cause of Action Solely under Federal Law, There can be no Recovery under State Law—Contrary Rulings.
- Sec. 684. Petition Stating a Cause of Action Under State Law, Recovery Permitted under Federal Act When Omitted Allegations are Supplied by the Answer.
- Sec. 685. Recovery under Petition Stating Cause of Action under State Law Though Evidence Shows a Case under Federal Act, Harmless Error on Appeal, When.
- Sec. 686. Pleading Cause of Action under State Law in One Count and under Federal Act in Another Count, Allowed.
- Sec. 687. Petition Need not Specifically Refer to the Act if Facts Showing Liability Thereunder are Plead.
- Sec. 688. State Law as to Sufficiency of Pleading Governs.
- Sec. 689. Allegations as to Engagement in Interstate Commerce Held Sufficient.
- Sec. 690. Allegation to Show Cause of Action under the Federal Act Held not Sufficient.
- Sec. 691. In cases of Death Petition Must Allege Survival of Beneficiaries Named in Statute.
- Sec. 692. Petition Must Allege Pecuniary Loss to Beneficiaries.
- Sec. 693. In Suits under State or Common Law, Applicability of Federal Act may be Raised by Answer.
- Sec. 694. Where Petition is Under State Law and Evidence Shows Case under Federal Statute, Plaintiff Cannot Recover.
- Sec. 695. Defendant in Suit under State Law Must Specifically Plead Facts under Federal Act to Defeat Recovery.
- Sec. 696. Amendment Setting up New Cause of Action after Two-Year Period of Limitation not Allowed.
- Sec. 697. Amendments Permissible after Two-Year Period of Limitation.

## CHAPTER XXXVII.

## EVIDENCE UNDER LIABILITY ACT.

- Sec. 698. Rules of Evidence Governed by State Law.
- Sec. 699. Law of Forum Determines Whether Widow or Other Beneficiaries may Testify.



- Sec. 700. State Law not Applicable in Passing on Demurrer to the Evidence.
- Sec. 701. Record Evidence of Interstate Shipments—Statutory Provision and Order of Interstate Commerce Commission.
- Sec. 702. Method of Proving When Train and Switching Crews are Engaged in Interstate Commerce.
- Sec. 703. Method of Proving When Other Railroad Employes are Engaged in Interstate Commerce.
- Sec. 704. Evidence Held Sufficient to Show that Train was Carrying Interstate Commerce.
- Sec. 705. Evidence Held not Sufficient to Show that Train was Carrying Interstate Commerce.

## CHAPTER XXXVIII.

## MATTERS OF PRACTICE UNDER LIABILITY ACT.

- Sec. 706. At What Stage of Proceedings, Motion to Elect Should be Sustained—Practical Considerations.
- Sec. 707. Motions to Elect under Iowa Statute in Actions under Federal Act.
- Sec. 708. Instances Where Motion to Elect Should have been Sustained before Trial.
- Sec. 709. Widow Suing in her Own Name in One Suit and as Administratrix in Another, Cannot be Compelled to Elect.
- Sec. 710. Verdicts by Less Than Twelve Jurors, When Permissible under State Law, Valid in Actions under Federal Statute.
- Sec. 711. Commencement of Action under State Law no Bar to Subsequent Suit under Federal Act.
- Sec. 712. When Suit under State Law is Res Adjudicata.
- Sec. 713. Errors in Actions under Federal Act Held Harmless on Appeal.
- Sec. 714. Practice of Granting Partial new Trials in Actions under Federal Act, Proper, When.
- Sec. 715. Power of State Courts under Federal Act to Direct Entry of Judgment Notwithstanding Verdict.
- Sec. 716. Power of Administrator to Settle Claims under Federal Act Without Consent of Court.
- Sec. 717. State Laws Adding Penalties to Judgment when Affirmed on Appeal Applicable under Federal Act.
- Sec. 718. Plaintiff in Action under Federal Act may Sue as a Poor Person in United States Courts, When.

## PART FOUR

## FEDERAL SAFETY APPLIANCE ACT.

## CHAPTER XXXIX.

HISTORICAL REVIEW OF ORIGINAL ACT AND AMENDMENTS  
AND ORDERS THEREUNDER.

- Sec. 719. Futile Legislation of the States Requiring the Use of Automatic Couplers.
- Sec. 720. Liability of Carriers under the Common Law as to Couplers and Brakes.
- Sec. 721. Causes Including the Enactment of the Original Federal Safety Appliance Act.
- Sec. 722. Summary of the Provisions of the Original Act of 1893.
- Sec. 723. Original Order of Commission Prescribing Standard Height of Drawbars on Freight Cars.
- Sec. 724. Inadequacies and Defects of Statute and Difficulties in its Enforcement.
- Sec. 725. Summary of the Amendments of 1903.
- Sec. 726. Order of Commission Increasing Minimum Percentage of Cars in Trains to be Equipped with Air Brakes.
- Sec. 727. Agitation for Standard Safety Appliances on all Cars used by Railroads Engaged in Interstate Commerce.
- Sec. 728. Interstate Commerce Commission Authorized to Standardize Appliances by Amendment of 1910.
- Sec. 729. New Order Concerning Height of Drawbars on Freight Cars.
- Sec. 730. Standardization Order of the Interstate Commerce Commission.

## CHAPTER XL.

PURPOSE, GENERAL SCOPE, VALIDITY, INTERPRETATION AND  
EFFECT OF STATUTE.

- Sec. 731. Validity of the Original Safety Appliance Act of 1903.
- Sec. 732. Purpose and Object of Congress in Enacting the Safety Appliance Act.
- Sec. 733. Construction of Statute.
- Sec. 734. Rules Governing Construction of Criminal Statute not Applicable.
- Sec. 735. Federal Decisions Control in Construing Safety Appliance Act.
- Sec. 736. Custom of Railroads with Acquiescence of Commission Persuasive in Determining Meaning of Statute.
- Sec. 737. Distinction Between This Statute and Employers' Liability Act as to Intrastate Commerce.
- Sec. 738. Remedial Provisions of Safety Appliance Act not Limited to Employees.

- Sec. 739. Statute Applies to All the Territories of the United States and the District of Columbia.
- Sec. 740. Safety Appliance Act as Amended Includes Cars Used in Intrastate as Well as in Interstate Commerce.
- Sec. 741. Constitutionality of Amendment Including Cars Used Exclusively in Intrastate Commerce.
- Sec. 742. Relationship of Intrastate Cars to Interstate Commerce.
- Sec. 743. Meaning of the Term "Used" on Interstate Highways.
- Sec. 744. Applicability of Statute to Intrastate Cars on Tracks Other Than Main Lines.
- Sec. 745. No Distinction Between Passenger and Freight Cars.
- Sec. 746. State Laws as to Safety Appliances on all Cars of Interstate Railroads Invalid.
- Sec. 747. Punishment of Crime Against Two Sovereignties Not Applicable in Such Cases.
- Sec. 748. Delegation to American Railway Association and Commission of Authority to Designate Height of Drawbars Valid.
- Sec. 749. Cars and Vehicles Subject to the Statute.
- Sec. 750. Statute Applies to Island of Porto Rico.
- Sec. 751. Carriers Hauling Car with Defective Appliances over Track of Another Railroad Subject to Penalty.

## CHAPTER XLI.

## WHEN CARRIERS ARE ENGAGED AND CARS ARE USED IN INTERSTATE COMMERCE UNDER SAFETY APPLIANCE ACT.

- Sec. 752. Scope of Chapter.
- Sec. 753. What Constitutes Interstate Commerce within Purview of Safety Appliance Act.
- Sec. 754. Railroad Must be a Common Carrier.
- Sec. 755. Two Requirements as to Interstate Character of Carriers and Cars Prior to 1903 Amendment.
- Sec. 756. Proof of Use of Car in Moving Interstate Traffic not Essential Since the 1903 Amendment.
- Sec. 757. But Use of Car in Moving Interstate Traffic Still Material in Determining Application of Employers' Liability Act.
- Sec. 758. Interstate Status of Belt Lines, Terminal Railroads and Stock Yard Companies.
- Sec. 759. Railroad Wholly Within State Transporting Freight in Continuous Shipment Without Traffic Agreement with Other Carriers.
- Sec. 760. Foregoing Principle Illustrated and Applied in Adjudicated Cases.
- Sec. 761. Interurban Electric Railroads Participating in Movement of Interstate Traffic.
- Sec. 762. Industrial Railroads Forming Connecting Link for Interstate Transportation.
- Sec. 763. Transportation from One Point to Another in Same State Passing in Transit Through Another State.

- Sec. 764. All Cars Hauled in Interstate Trains Impressed with Interstate Character.
- Sec. 765. Switching of Car From One Yard to Another Preparatory for Interstate Trip.
- Sec. 766. Re-billing Does not Control in Determining Whether a Shipment is Interstate or Intrastate.
- Sec. 767. Hauling Empty Car Over the State Line Constitutes Interstate Commerce.
- Sec. 768. Car Containing Interstate Traffic Placed on Switching Track for Repairs.
- Sec. 769. Dining Car on Siding Regularly Hauled in Interstate Trains.
- Sec. 770. Transportation of Interstate Traffic for Express Companies.
- Sec. 771. Transportation of Company Property Over State Line is Interstate Commerce.
- Sec. 772. Distinctions between "Haul" and "Use" of Cars Eliminated by 1903 Amendment.
- Sec. 773. Movement of Cars From Transfer Tracks to Industrial Track.

## CHAPTER XLII.

## BASIS, NATURE AND EXTENT OF LIABILITY UNDER STATUTE.

- Sec. 774. Disregard of Requirements of Statute Negligence Per Se.
- Sec. 775. Statute Imposes Absolute and Unqualified Duty to Maintain Appliances in Secure Condition.
- Sec. 776. Substitutes for Appliances Required by Safety Appliance Act not Lawful.
- Sec. 777. Duty of Carrier in Personal Injury Suits as Broad as in Actions for Penalties.
- Sec. 778. Remedial Features of the Statute Apply to Movements of Cars Solely for Repairs.
- Sec. 779. Doctrine of *Seigel v. New York, C. & H. R. R. Co.*, and Like Cases, Overruled.
- Sec. 780. Duties Imposed by Statute in One Relation not Actionable in Another.
- Sec. 781. Proof of Knowledge of Defect Not an Element of Violation of Statute.
- Sec. 782. Use of Care and Diligence in Discovering and Repairing Defects, No Defense.
- Sec. 783. Proof of Negligence Under Liability Act not Required if Injury was Due to Violation of Safety Appliance Act.
- Sec. 784. Same Subject—*Taylor v. St. Louis, I. M. & S. Ry. Co.*
- Sec. 785. When Employee's Negligence is Sole Cause of Injury, No Recovery Permitted.
- Sec. 786. Duties Imposed by Statute Cannot be Evaded by Contract.
- Sec. 787. Inconvenience and Impracticability of Statutory Requirements Will not Excuse Violation.
- Sec. 788. Appliances Required by Statute must be Operative.

- .. Sec. 789. Failure of Employee to Operate Appliance Capable of Being Operated, no Offense.
- Sec. 790. Deliberate Act of Employee in Causing Appliance to become Defective, no Defense.
- Sec. 791. Duties Placed upon Carrier by Statute Cannot be Evaded by Assignment.
- Sec. 792. Railroad Liable for Condition of Foreign Cars.
- Sec. 793. Carriers may Refuse Defective Cars from Connecting Lines.
- Sec. 794. Defective Equipment Must be Proximate Cause of Injury.
- Sec. 795. Question of Proximate Cause Ordinarily for the Jury.

CHAPTER XLIII.

STATUTORY REQUIREMENTS AS TO AIR BRAKES.

- Sec. 796. Former and Present Requirements as to Power or Air Brakes on Trains.
- Sec. 797. Air Brake Provision not Applicable to Switching Movements.
- Sec. 798. What Constitutes a "Train" Under Air Brake Provision.
- Sec. 799. Inter-yard Movements as Distinguished from Intra-yard Movements Within Air Brake Provision—Transfer Trains.
- Sec. 800. Air Brakes Required on Interurban Electric Trains and Motors.
- Sec. 801. Injuries in Collisions Due to Failure of Train Brakes to Work.
- Sec. 802. Use of Hand Brakes in Train Movements Prohibited and Operation of Air Brakes Mandatory.
- Sec. 803. Absolute Duty to Maintain Appliances in Repair Applies to Air Brakes.

CHAPTER XLIV.

STATUTORY REQUIREMENTS AS TO AUTOMATIC COUPLERS.

- Sec. 804. The Statutory Provision.
- Sec. 805. Object of Congress in Requiring Automatic Couplers on Railroad Cars.
- Sec. 806. Illustrative Cases Showing Defective Couplers in Violation of Statute.
- Sec. 807. Failure of Coupler to Work Under all Circumstances Constitutes Violation of Statute.
- Sec. 808. Employees Entitled to Protection of Statute Requiring Automatic Couplers.
- Sec. 809. Trainmen on Top of Cars and not Actually Engaged in Coupling Them.
- Sec. 810. When Violation of Automatic Coupler Provision is not Actionable as to Employees Injured on Duty.
- Sec. 811. Employees Entering Between Cars for Other Purposes Than Coupling or Uncoupling.
- Sec. 812. Effect of Equipping Cars with Automatic Couplers of Different Patterns.

- Sec. 813. Coupler Provision Applies to all Cars on Interstate Highways by Rail.
- Sec. 814. Automatic Couplers Required in Switching Operations as well as in Line Movements.
- Sec. 815. Statute Applies to Coupling as Well as to Uncoupling.
- Sec. 816. Coupling of Air and Steam Hose Between Cars no Part of Coupling Operation.
- Sec. 817. Operative Couplers Required at Both Ends of Cars.
- Sec. 818. Exception to the Foregoing—Conflicting Rulings.
- Sec. 819. Automatic Couplers not Required on Singly Operated Self-Propelled Trolley Cars.
- Sec. 820. Preparation of Car for Coupling, Part of Act Regulated by Statute.
- Sec. 821. That Coupling Could Have Been Automatically Effected by Using Lever on Other Side, no Defense.
- Sec. 822. Automatic Couplers not Required between Engine and Tender.
- Sec. 823. Actual Use of Coupler not Necessary to Constitute Offense.
- Sec. 824. Failure of Pin Lifter to Open Knuckles.
- Sec. 825. Illustrative Cases in which Violations of Coupler Provision Held to be Proximate Cause of Injuries.
- Sec. 826. Forms of Instructions for Violation of Coupler Provision in Personal Injury Cases.
- Sec. 827. Model Couplers May be Exhibited to the Jury.

#### CHAPTER XLV.

#### DUTIES OF CARRIERS AS TO GRAB IRONS, SILL STEPS, RUNNING BOARDS AND HAND BRAKES.

- Sec. 828. Requirement of Original Act Limited to Handholds for Coupling and Uncoupling Purposes Only.
- Sec. 829. Grab Iron Provision Enlarged by Amendment of 1903 to Include Intrastate Cars.
- Sec. 830. Sill Steps, Hand Brakes, Ladders, Running Boards and Certain Grab Irons.
- Sec. 831. Employees Using Grab Irons for Other Purposes Than Coupling Cars, Within Protection of Statute.
- Sec. 832. No Distinction between Foreign and Domestic Cars.
- Sec. 833. Substitutes Affording Equal Security with Grab Iron or Handhold Unlawful.
- Sec. 834. Duty to Furnish Sill Steps, Running Boards, Hand Brakes and Handholds Absolute and Mandatory.
- Sec. 835. Duties of Carriers Include Maintenance as well as Equipment of Cars with Statutory Appliances.
- Sec. 836. Patton v. Illinois C. R. Co. and Like Cases Overruled.
- Sec. 837. Extent of the Requirements of Section 2 of the 1910 Amendment.

- Sec. 838. Illustrative Violation of Failure to Maintain Secure Running Board.
- Sec. 739. Erroneous Views as to Non-Applicability of Hand Brake Provision to Switching Operations.
- Sec. 840. Requirements of Section 2 of 1910 Amendment not Affected by Order of Interstate Commerce Commission under Section 3.
- Sec. 841. Purpose of Congress in Empowering Commission to Prescribe Standardized Equipments on all Cars.

## CHAPTER XLVI.

## STATUTORY REQUIREMENTS AS TO DRAWBARS.

- Sec. 842. Standard Height of Drawbar Required After December 31, 1910.
- Sec. 843. Distinction Between New and Old Orders as to Height of Drawbars.
- Sec. 844. Ruling in St. Louis, I. M. & S. Ry. Co. v. Taylor, Modified by New Order.
- Sec. 845. Instruction Erroneous Under Both Old and New Orders.
- Sec. 846. Instructions Erroneous Under Old Order but Correct Under the New Order.
- Sec. 847. Drawbar Provision Applicable to Engines as well as Cars.
- Sec. 848. Duty as to Height of Drawbars Cannot be Delegated or Evaded by Casting it Upon Others.

## CHAPTER XLVII.

## CARS AND MOVEMENTS EXCEPTED FROM REQUIREMENTS OF STATUTE.

- Sec. 849. The Statutory Provision.
- Sec. 850. "Necessary Movement" for Repairs Defined.
- Sec. 851. When Duty Arises to Repair Cars at Point of Discovery.
- Sec. 852. All Movements of Cars from Repair Points Prohibited.
- Sec. 853. Illustrative Movements in Violation of 1910 Proviso.
- Sec. 854. Burden upon Carrier to Bring Itself Within Proviso of Act of 1910.
- Sec. 855. Defective Cars may be Hauled to Repair Points in Revenue Trains or with Other Cars Commercially Used.
- Sec. 856. Exceptions to the Safety Appliance Act must be Strictly Construed.
- Sec. 857. Exempted Movements for Repair do not Affect Liability for Personal Injuries.
- Sec. 858. Cars on Interurban Railroads Moving Partly Over Street Railroad Tracks Not Exempted.
- Sec. 859. May Haul Defective Cars Containing Livestock or Perishable Freight with Chains.
- Sec. 860. Necessity of Movement for Repairs Generally a Question for the Jury.

- Sec. 861. Law as to Movement of Defective Cars Prior to 1910 Amendment.
- Sec. 862. Cars Exempted from Requirements of Act on Interstate Highways not Subject to State Laws.

## CHAPTER XLVIII.

ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE  
UNDER SAFETY APPLIANCE ACT.

- Sec. 863. Assumption of Risk no Defense to Injury Due to Violation of Safety Appliance Act.
- Sec. 864. Employee's Knowledge of Defect no Bar to a Suit.
- Sec. 865. Assumption of Risk When Two Distinct Acts of Negligence are Submitted.
- Sec. 866. Distinction between Assumption of Risk and Contributory Negligence.
- Sec. 867. Contributory Negligence a Defense Prior to Enactment of Employers' Liability Act.
- Sec. 868. Contributory Negligence no Defense When Injured Employee is Engaged in Interstate Commerce.
- Sec. 869. Contributory Negligence a Defense When Employee is Engaged in Intrastate Commerce.
- Sec. 870. State Statutes Abolishing Defense of Contributory Negligence Applicable under Safety Appliance Act, When.
- Sec. 871. Effect of Rule Forbidding Employees from Going Between Cars While in Motion.
- Sec. 872. Contributory Negligence a Defense to Failure to Have Air Brakes on Logging Trains on Interstate Railroads.
- Sec. 873. Contributory Negligence as a Matter of Law in Choosing Dangerous Way to Uncouple Cars with Safe Method Available.
- Sec. 874. Errorless Instructions on Contributory Negligence in Such Cases.
- Sec. 875. When Contributory Negligence is a Question for the Jury.
- Sec. 876. Illustrative Cases in which Employees Going Between Cars were Not Guilty of Contributory Negligence as a Matter of Law.

## CHAPTER XLIX.

JURISDICTION OF COURTS AND MATTERS OF PLEADING AND  
PRACTICE IN PERSONAL INJURY CASES.

- Sec. 877. Rights under Statute for Personal Injuries May be Enforced in State Courts.
- Sec. 878. Procedure Controlled by State Rules.
- Sec. 879. Petition in Personal Injury Cases Need Specifically Refer to Statute.
- Sec. 880. Plaintiff Not Required to Negative Provisos.



- Sec. 881. Allegation as to Use of Car in Moving Intrastate Traffic.  
Sec. 882. Submitting Case under Safety Appliance Act Without Allegation of Interstate Employment not Error, When.  
Sec. 883. Judicial Notice of Orders of Commission under Safety Appliance Act.  
Sec. 884. Federal Statute of Limitation Controls When Employee is Engaged in Interstate Commerce.  
Sec. 885. State Statute of Limitation Controls in Absence of Interstate Employment.  
Sec. 886. Effect of Amendment Stating a New Cause of Action After Statute has Run.

## CHAPTER L.

## ACTIONS FOR PENALTIES.

- Sec. 887. In Prosecutions for Penalty, Carrier Liable as to Each Car Hauled in Violation of Statute.  
Sec. 888. Appropriate Remedy for Recovery of Statutory Penalty  
Sec. 889. Proceedings for Penalties Not Criminal Actions.  
Sec. 890. Burden and Quantum of Proof in Actions for Penalties.  
Sec. 891. Preponderance of the Evidence Defined.

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PART FIVE

## MISCELLANEOUS FEDERAL LAWS REGULATING CARRIERS.

Hours of Service Act.  
28-Hour Live Stock Law.  
Boiler Inspection Act.  
Ash Pan Act.  
Accident Reports Act.  
Adamson Law.

## CHAPTER LI.

## FEDERAL HOURS OF SERVICE ACT.

## A. PURPOSE, SCOPE, VALIDITY AND INTERPRETATION OF ACT.

- Sec. 892. State and Federal Control over Hours of Labor of Employees of Interstate Carriers.  
Sec. 893. Carriers and Employees Subject to the Hours of Service Act.  
Sec. 894. Constitutionality of the Hours of Service Act Affirmed.  
Sec. 895. Statute not Void for Uncertainty.  
Sec. 896. Classification of Operators in Section 2 of Statute does not Render Statute Invalid.  
Sec. 897. Power of Commission to Require Monthly Reports by Carriers Showing Violations of Statute.  
Sec. 898. Purpose of Congress in the Enactment of the Hours of Service Act.

- Sec. 899. The Statute, being Remedial, should be Liberally Construed.
- Sec. 900. Term "Railroad" as Used in the Act Defined.
- Sec. 901. Penalties for Violation of Statute—Procedure and Duty of Interstate Commerce Commission.
- Sec. 902. Separate Penalty Incurred for each Employee Kept on Duty Beyond Statutory Period Though Due to Same Cause.
- Sec. 903. Statute may not be Evaded by Requiring Service of Another Kind after Statutory Period.

#### B. LIMITATIONS UPON HOURS OF SERVICE.

- Sec. 904. Limitation upon the Hours of Service of Employees Engaged in or Connected with Movement of Trains.
- Sec. 905. When an Employee is "on Duty."
- Sec. 906. Effect of Brief Periods Off Duty in Breaking Continuity of Service.
- Sec. 907. Release from Duty for Definite Period of Two Consecutive Hours.
- Sec. 908. Duty to Substitute Relief Crews at Intermediate Terminals to Prevent Excessive Hours.
- Sec. 909. Fireman Engaged in Watching an Engine on Duty Within Meaning of Statute.
- Sec. 910. Limitation upon the Hours of Service of Employees Handling Orders Affecting Train Movements.
- Sec. 911. Applicability of Operators' Proviso to Tower Men and Switch Tenders in Railroad Yards—Conflicting Rulings.
- Sec. 912. Hours of Service in Telegraph Offices Operated During Day and Part of Night.
- Sec. 913. Separate Periods of Service for Operators not Exceeding Total of Nine Hours in Twenty-four Hours, not Unlawful.
- Sec. 914. Two Telegraph Offices in One City Constitute One "Place" Within Statute, When.

#### C. STATUTORY EXCEPTIONS AND EXCUSES.

- Sec. 915. When Provisions of Statute Limiting Hours of Service are not Applicable.
- Sec. 916. Terms "Casualty," "Unavoidable Accident" and "Act of God" as Used in Section 3 Defined.
- Sec. 917. High Degree of Diligence Required to Bring Carrier Within Statutory Exceptions.
- Sec. 918. Derailments and Collisions of Trains Constitute "Casualties" within Meaning of Exemption Clause.
- Sec. 919. Ordinary Delays Incident to Train Operation not Valid Excuses.
- Sec. 920. What Constitutes an Emergency Within Operators' Proviso of Section 2.
- Sec. 921. Insubordination of Employee may Constitute "Emergency" Within Section 2.
- Sec. 922. Burden of Proving Excessive Service to be Within Statutory Exception is Upon Carrier.

## CHAPTER LII.

## FEDERAL 28-HOUR LIVE STOCK LAW.

- Sec. 923. Duties of Interstate Common Carriers in Transporting Live Stock.
- Sec. 924. Time Consumed in Loading and Unloading Live Stock Must not be Considered—Exception as to Sheep.
- Sec. 925. Time may be Extended upon Written Request of Owner.
- Sec. 926. When Carriers are Excused from Complying with Statute.
- Sec. 927. Animals Unloaded Pursuant to Statute may be Fed at Expense of Owner.
- Sec. 928. Penalty for Non-Compliance with 28-Hour Live Stock Law.
- Sec. 929. Statute not Applicable when Animals are Properly Cared For.
- Sec. 930. Penalties may be Recovered by Civil Actions.

## CHAPTER LIII.

## FEDERAL BOILER INSPECTION ACT.

- Sec. 931. Railroads and Employes Subject to Boiler Inspection Act.
- Sec. 932. Duties and Obligations of Carriers Under Boiler Inspection Act.
- Sec. 933. President Authorized to Appoint Chief Inspectors of Locomotive Boilers.
- Sec. 934. Fifty Boiler Inspection Districts Created with One Inspector for Each.
- Sec. 935. Duties of District Inspectors in the Enforcement of Statute and Rules Thereunder.
- Sec. 936. Carrier May Appeal from Decision of Inspector as to Condition of Locomotive.
- Sec. 937. Rules and Regulations for Inspection of Locomotive Boilers Required to be Adopted and Enforced.
- Sec. 938. Nature of Duty Created by Boiler Inspection Act.
- Sec. 939. Reports of Accidents Affecting Locomotive Boilers, to be Filed by Carriers, When.
- Sec. 940. Commission May Publish Reports of Investigation of Accidents.
- Sec. 941. Reports of Investigations not to be Used in Damage Suits.
- Sec. 942. Penalties for Violation of Statute.
- Sec. 943. Terms "Railroad" and "Employes" Within Statute Defined.
- Sec. 944. Sworn Reports of Inspection by Carriers must be Filed.
- Sec. 945. Chief Inspector Required to Make Annual Report to Interstate Commerce Commission.
- Sec. 946. Amendment of 1915 to Boiler Inspection Act Extending Statute to all Parts of Locomotives.
- Sec. 947. State Laws Requiring Headlights Superseded by Amendment of 1915.

CHAPTER LIV.

FEDERAL ASH PAN ACT.

- Sec. 948. Federal Ash Pan Act.
- Sec. 949. Penalties for Violation of the Act.
- Sec. 950. Duties of Interstate Commerce Commission.
- Sec. 951. Receivers are Common Carriers within the Act.
- Sec. 952. Statute not Applicable to Electric Locomotives.

CHAPTER LV.

FEDERAL ACCIDENT REPORTS ACT.

- Sec. 953. Duties of Common Carriers under Federal Accident Reports Act.
- Sec. 954. Terms "Interstate Commerce" and "Foreign Commerce" Within Statute Defined.
- Sec. 955. Penalty for Failure to Make Such Reports Within Thirty Days After End of Each Month.
- Sec. 956. Interstate Commerce Commission Authorized to Investigate all Collisions, Derailments, etc.
- Sec. 957. Reports of such Investigations may be Published but may not be Used in Damage Suits.

CHAPTER LVI.

ADAMSON LAW.

- Sec. 958. Eight Hours shall be Deemed Day's Work for Purpose of Reckoning Compensation of Interstate Employes.
- Sec. 959. Railroads and Employes Excepted from the Provisions of the Statute.
- Sec. 960. President Empowered to Appoint Commission to Observe Operation and Effect of Eight Hour Wage Law.
- Sec. 961. Wages of Railway Employes Subject to Statute not to Be Reduced Pending Report of Commission.
- Sec. 962. Penalty for Violation of the Adamson Act.
- Sec. 963. Adamson Act a Valid Exercise of the Power of Congress Under the Commerce Clause.

## APPENDIXES

**Appendix A**

The Act to Regulate Commerce as Amended.

**Appendix B**

The Elkins Act.

**Appendix C**

The Federal Bill of Lading Act.

**Appendix D**

The Act Providing for Federal Control of Transportation Systems During War.

**Appendix E**

Rules of Practice before the Commission in Proceedings under the Act to Regulate Commerce.

**Appendix F**

The Federal Employers' Liability Act as Amended.

**Appendix G**

Federal Safety Appliance Act as Amended.

**Appendix H**

Orders of Interstate Commerce Commission under Safety Appliance Act.

**Appendix I**

The Federal Hours of Service Act.

**Appendix J**

The Federal Boiler Inspection Act.

**Appendix K**

Rules and Orders of Interstate Commerce Commission under Boiler Inspection Act.

**Appendix L**

The Federal 28-Hour Live Stock Law.

**Appendix M.**

The Federal Ash Pan Act.

**Appendix N**

The Federal Accident Reports Act.

**Appendix O**

The Adamson Law

**Appendix P**

The Transportation of Explosives Act.

**Appendix Q**

General Orders of Director General of Railroads Under Federal Control Act of 1918.



**PERSONAL INJURIES  
TO INTERSTATE EMPLOYEES  
OF COMMON CARRIERS**

**PART THREE (Continued).**

**VOLUME II**





# PERSONAL INJURIES TO INTERSTATE EMPLOYEES OF COMMON CARRIERS

## PART THREE (Continued).

### VOLUME II

#### CHAPTER XXXI.

##### DAMAGES IN DEATH CASES UNDER LIABILITY ACT.

- Sec. 599. The Statute.
- Sec. 600. No Recovery under Federal Act unless Relatives Named in Statute Suffer Pecuniary Loss.
- Sec. 601. If Injured Employee Lives an Appreciable Length of Time Beneficiaries May Also Recover Under 1910 Amendment.
- Sec. 602. Damages Under Section 9 Limited to Loss and Suffering While Deceased Employee Lived.
- Sec. 603. Loss of Future Earnings of Decedent not Included in Damages Due Beneficiaries Under Section 9.
- Sec. 604. No Recovery for Pain and Suffering of Deceased by Beneficiaries Prior to 1910 Amendment.
- Sec. 605. No Recovery of Damages under Section 9 when Death of Employee is Instantaneous.
- Sec. 606. Death must be Result of Negligence before Beneficiaries can Recover under Section 1, but not under Section 9.
- Sec. 607. Decisions of National Courts on Measure of Damages Control.
- Sec. 608. Measure of Damages in Cases of Death under Section one of the Federal Act.
- Sec. 609. Damages Due Beneficiaries for Loss of Future Benefits Limited to Present Cash Value.
- Sec. 610. Subsequent Application of Doctrine of Kelly Case in State Courts.
- Sec. 611. Statutory Action is not for the Equal Benefit of Each of the Surviving Beneficiaries.
- Sec. 612. Pecuniary Loss not Dependent upon any Legal Liability of the Employee to the Beneficiaries.
- Sec. 613. Distribution of Amount Recovered Controlled by Federal Statute and not State Laws.
- Sec. 614. Method of Apportioning Fund Among Beneficiaries upon a Lump Sum Settlement.
- Sec. 615. No Presumption of Damage to Widow and Child.
- Sec. 616. Effect of Abandonment by Husband on Right of Widow and Child to Recover.
- Sec. 617. Loss of Society, Companionship and Wounded Affections not Elements of Damages.
- Sec. 618. Loss of Care, Counsel, Training and Education of Minors Proper Elements of Damages.

- Sec. 619. Damages of the Estate of Decedent not Recoverable.
- Sec. 620. Necessity of Evidence Showing Earnings Beneficiaries have been Deprived of.
- Sec. 621. Award of Exemplary Damages not Permissible as to Interstate Employees.
- Sec. 622. Funeral Expenses not Recoverable in Actions under the Federal Act.
- Sec. 623. Necessity of Showing Contributions during Lifetime of Deceased to Beneficiaries of First and Second Classes.
- Sec. 624. Illustrative Cases Involving Sufficiency of Proof to Establish Dependency.
- Sec. 625. Actual Dependency Either Total or Partial must be Shown by Beneficiaries of Third Class.
- Sec. 626. What Constitutes Dependency as to Third Class Beneficiaries.
- Sec. 627. Proof of Occasional Gifts does not Create Dependency as to Beneficiaries of Third Class.
- Sec. 628. Cases Declaring the True Measure of Damages and Approved by the United States Supreme Court.
- Sec. 629. Erroneous Instructions on Measure of Damages under Federal Act.
- Sec. 630. Errorless Instructions on Measure of Damages under Federal Act.
- Sec. 631. Reference in Instructions on Measure of Damages to Sum Sued for, not Erroneous.
- Sec. 632. State Statutes Limiting Amounts Recoverable in Death Cases Inapplicable to Interstate Employees.
- Sec. 633. State Law Giving Earnings of Minor Son to Father Applicable in Determining Pecuniary Loss.
- Sec. 634. Effect of Excessive Apportionment to one Beneficiary.
- Sec. 635. Remittitur may Cure Error of Failure to Reduce Damages on Account of Contributory Negligence.
- Sec. 636. Propriety of Special Verdicts When Actions Involve Reduction of Damages Due to Contributory Negligence.
- Sec. 637. Settlement with One Beneficiary does not Defeat Action by a Personal Representative.
- Sec. 638. Damages Due Each Beneficiary May be Apportioned in the Verdict.

§ 599. **The Statute.** In death cases the federal act creates two distinct and separate liabilities for damages. Section 1 of the act provides that every carrier shall be liable in damages in case of the death of an employe, resulting in whole or in part from negligence, to his or her personal representative for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents, and, if none, then of the next of kin dependent upon such employe. Section 9 of the act provides that

any right of action given by the statute to a person suffering injury shall survive to his or her personal representative for the benefit of the same beneficiaries named in Section 1. The distinction between these two sections of the act should be carefully noted in determining questions of damages.

**§ 600. No Recovery under Federal Act unless Relatives Named in Statute Suffer Pecuniary Loss.** If at the time of the death of an employe or an injury which subsequently caused death, the carrier was engaged in interstate commerce and the injured servant was employed by it in such commerce, there is no remedy against the carrier unless dependent beneficiaries named in the act survive him. The question of survival of the cause of action is not one of procedure governed by the state practice but depends upon the substance of the action.<sup>1</sup> Even though a deceased employe left surviving him beneficiaries named in the statute, yet there is no liability when the federal act is applicable, unless the beneficiaries were dependent upon the deceased or suffered pecuniary loss by his death.<sup>2</sup>

1. Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. Ed. 417, 33 Sup. Ct. 192, 3 N. C. C. A. 807, Ann. Cas. 1914C 176.

2. United States. Great Northern R. Co. v. Capital Trust Co., 242 U. S. 144, 61 L. Ed. 208, 37 Sup. Ct. 41, L. R. A. 1917E 1050; Chesapeake & O. R. Co. v. Gainey, 241 U. S. 494, 60 L. Ed. 1124, 36 Sup. Ct. 633; Chesapeake & O. R. Co. v. Kelly, 241 U. S. 485, 60 L. Ed. 1117, 36 Sup. Ct. 630, 13 N. C. C. A. 673, L. R. A. 1917F 367; Norfolk & W. R. Co. v. Holbrook, 235 U. S. 625, 59 L. Ed. 392, 35 Sup. Ct. 143; Garrett v. Louisville & N. R. Co., 235 U. S. 308, 59 L. Ed. 242, 35 Sup. Ct. 32; American R. Co. of Porto Rico v. Birch, 224 U. S. 547, 56 L. Ed. 879, 32 Sup. Ct. 603; Illinois Cent. R.

Co. v. Stewart, 138 C. C. A. 444, 223 Fed. 30; Moffett v. Baltimore & O. R. Co., 135 C. C. A. 607, 220 Fed. 39; Illinois Cent. R. Co. v. Porter, 125 C. C. A. 55, 207 Fed. 311; Cain v. Southern Ry. Co., 199 Fed. 211.

Arkansas. St. Louis, I. M. & S. R. Co., v. Rodgers, 118 Ark. 263, 176 S. W. 696.

Connecticut. Farley v. New York, N. H. & H. R. Co., 87 Conn. 328, 87 Atl. 990.

Georgia. Southern Ry. Co. v. Hill, 139 Ga. 549, 77 S. E. 803.

Kansas. Griffith v. Midland Valley R. Co., 100 Kan. 500, 166 Pac. 467.

Kentucky. Davis' Adm'r v. Cincinnati, N. O. & T. P. R. Co., 172 Ky. 55, 188 S. W. 1061; Louisville & N. R. Co., v. Thomas' Adm'r,

Unless the plaintiff shows that the beneficiaries named in the statute have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employe, there can be no recovery. The damage is strictly limited to the financial loss thus sustained.<sup>3</sup> In the McGinnis case, cited *supra*, the

170 Ky. 145, 185 S. W. 840; Louisville & N. R. Co. v. Holloway's Adm'r, 168 Ky. 262, 181 S. W. 1126; McGarvey's Guardian v. McGarvey's Adm'r, 163 Ky. 242, 173 S. W. 765; Louisville & N. R. Co. v. Holleway's Adm'r, 163 Ky. 125, 173 S. W. 343; Illinois Cent. R. Co. v. Doherty's Adm'r, 153 Ky. 363, 47 L. R. A. (N. S.) 31, 155 S. W. 1119.

**Louisiana.** Jones v. Kansas City Southern R. Co., 137 La. 178, 11 N. C. C. A. 43, 68 So. 401.

**Minnesota.** Lundeen v. Great Northern R. Co., 128 Minn. 332, 150 N. W. 1088.

**Mississippi.** New Orleans, M. & C. R. Co. v. Jones, 111 Miss. 852, 72 So. 681.

**Missouri.** Smith v. Pryor, 195 Mo. App. 259, 190 S. W. 69; Newkirk v. Pryor (Mo. App.), 183 S. W. 682.

**Nebraska.** Zitnik v. Union Pac. R. Co., 95 Neb. 152, 145 N. W. 344.

**North Carolina.** Kenney v. Seaboard Air Line R. Co., 165 N. C. 99, 80 S. E. 1078; Raines v. Southern R. Co., 169, N. C. 189, 85 S. E. 294.

**Oklahoma.** Kansas City, M. & O. R. Co. v. Roe, 50 Okla. 105, 150 Pac. 1035.

**South Carolina.** Berg v. Atlantic Coast Line R. Co., — S. C. —, 93 S. E. 390; Bennett v. Southern Ry-Carolina Division, 98 S. C. 42, 79 S. E. 710.

**Tennessee.** Nashville, C. & St. L. Ry. v. Anderson, 134 Tenn. 666,

Ann. Cas. 1917D 902, 185 S. W. 677; Carolina, C. & O. R. R. v. Shewalter, 128 Tenn. 363; L. R. A. 1916C 964, Ann. Cas. 1915C 605, 161 S. W. 1136.

**Washington.** Fogarty v. Northern Pac. R. Co., 85 Wash. 90, 11 N. C. C. A. 84, L. R. A. 1916C 803, 147 Pac. 652; Fogarty v. Northern Pac. R. Co., 74 Wash. 397, L. R. A. 1916C 800, 133 Pac. 609.

**Wisconsin.** Calhoun v. Great Northern R. Co., 162 Wis. 264, 156 N. W. 198; Sweet v. Chicago & N. W. R. Co., 157 Wis. 400, 147 N. W. 1054.

3. **United States.** Great Northern R. Co. v. Capital Trust Co., 242 U. S. 144, 61 L. Ed. 208, 37 Sup. Ct. 41, L. R. A. 1917E 1050; Chesapeake & O. R. Co. v. Gainey, 241 U. S. 494, 60 L. Ed. 1124, 36 Sup. Ct. 633; Chesapeake & O. R. Co. v. Kelly, 241 U. S. 485, 60 L. Ed. 1117, 36 Sup. Ct. 630, 13 N. C. C. A. 673, L. R. A. 1917F 367; Kansas City Southern R. Co. v. Leslie, 238 U. S. 599, 59 L. Ed. 1478, 35 Sup. Ct. 844; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C 159; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. Ed. 1129, 33 Sup. Ct. 651, 3 N. C. C. A. 800 Ann. Cas. 1914C 156; Gulf, C. & S. F. Co. v. McGinnis, 228 U. S. 173, 57 L. Ed. 785, 33 Sup. Ct. 426, 3 N. C. C. A. 806; American R. Co. of Porto Rico v. Didricksen, 227 U. S. 145, 57 L. Ed. 456, 33 Sup. Ct. 224, Michigan Cent. R.

Supreme Court of the United States, in overruling the decision of one of the courts of appeals in Texas, said: "The court of civil appeals upheld this ruling, saying that 'the federal statute expressly authorizes the suit to be brought by the personal representative for the benefit of the surviving wife and children of the deceased, irrespective of whether they were dependent upon him, or had the right to expect any pecuniary assistance from him.' This construction of the character of the statutory liability imposed by the act of Congress was erroneous. In a series of cases lately decided by this court, the act in this aspect has been construed as intended only to compensate the surviving relatives of such a deceased employe for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given. The recovery therefore must be limited to compensating those relatives for whose

**Co. v. Vreeland**, 227 U. S. 59, 57 L. Ed. 417, 33 Sup. Ct. 192, 3 N. C. C. A. 807, Ann. Cas. 1914C 176; **Philadelphia & R. R. Co. v. Maryland**, 152 C. C. A. 51, 239 Fed. 1, 15 N. C. C. A. 402; **Hogan v. New York Cent. & H. River R. Co.**, 139 C. C. A. 328, 223 Fed. 890, 12 N. C. C. A. 1050; **Thomas v. Chicago & N. W. Ry. Co.**, 202 Fed. 766.

**Kentucky.** **Davis' Adm'r v. Cincinnati, N. O. & T. P. R. Co.**, 172 Ky. 55, 188 S. W. 1061; **Pittsburgh, C. & St. L. R. Co. v. Collard's Adm'r**, 170 Ky. 239, 185 S. W. 1108; **Louisville & N. R. Co. v. Thomas' Adm'r**, 170 Ky. 145, 185 S. W. 840; **Louisville & N. R. Co. v. Holloway's Adm'r**, 168 Ky. 262, 181 S. W. 1126; **Chesapeake & O. R. Co. v. Dwyer's Adm'r**, 157 Ky. 590, 163 S. W. 752; **Illinois Cent. R. Co. v. Doharty's Adm'r**, 153 Ky. 363, 47 L. R. A. (N. S.) 31, 155 S. W. 1119.

**Missouri.** **Newkirk v. Pryor** (Mo. App.), 183 S. W. 682.

**North Carolina.** **Raines v. Southern R. Co.**, 169 N. C. 189, 85 S. E. 294; **Dooley v. Seaboard Air Line R. Co.**, 163 N. C. 454, L. R. A. 1916E 185, 79 S. E. 970.

**Oklahoma.** **Kansas City, M. & O. R. Co. v. Roe**, 50 Okla. 105, 150 Pac. 1035.

**South Carolina.** **Dutton v. Atlantic Coast Line R. Co.**, 104 S. C. 16, 88 S. E. 263.

**Tennessee.** **Nashville, C. & St. L. Ry. v. Anderson**, 134 Tenn. 666, Ann. Cas. 1917D 902, 185 S. W. 677.

**Utah.** **Kipros v. Uintah R. Co.**, 45 Utah 389, 146 Pac. 292.

**Washington.** **Fogarty v. Northern Pac. R. Co.**, 85 Wash. 90, 11 N. C. C. A. 84, L. R. A. 1916C 803, 147 Pac. 652.

**West Virginia.** **Culp v. Virginian R. Co.**, 77 W. Va. 125, 87 S. E. 187.

Even in actions brought on behalf of the beneficiaries of the first class, it may be shown that no actual pecuniary loss, present

benefit the administrator sues as are shown to have sustained some pecuniary loss.”

**§ 601. If Injured Employee Lives an Appreciable Length of Time, Beneficiaries May also Recover Under 1910 Amendment.** Section 9 of the Act, one of the 1910 amendments, provides that any right of action given by the statute to an employee suffering injury, shall survive to the personal representative for the benefit of the same beneficiaries that are named in Section 1. If, therefore, an employee is injured and lives an appreciable length of time after the injury and is conscious and capable of suffering pain, then the beneficiaries may not only recover under Section 1 for the loss and damage to them sustained by reason of the death, but they may also, in addition thereto, recover damages under Section 9 which the decedent suffered while he lived, that is, for his loss, and pain and suffering to the time of his death.<sup>4</sup> But such pain and suffering as are substantially contemporaneous with death, or are mere incidents to it, as well as the short periods of insensibility which sometimes intervene between fatal injuries and death, afford no basis for a separate estimation or award of damages under the provisions of Section 9.<sup>5</sup> One of the first and leading cases construing

or prospective, resulted to them from the death of the decedent.

*Gilliam v. Southern Ry. Co.*, — S. C. —, 93 S. E. 865.

4. *Great Northern R. Co. v. Capital Trust Co.*, 242 U. S. 144, 61 L. Ed. 208, 37 Sup. Ct. 41; *St. Louis, I. M. & S. Ry. Co. v. Craft*, 237 U. S. 648, 59 L. Ed. 1160, 35 Sup. Ct. 704, 9 N. C. C. A. 754.

An administrator may recover under the federal act in one action not only for the pecuniary loss sustained by the beneficiaries, but also damages on account of conscious pain and suffering of the deceased, in case the fatal accident did not produce immediate death. *Chafin v. Norfolk & W.*

*Ry. Co.*, — W. Va. —, 93 S. E. 822.

5. *Great Northern R. Co. v. Capital Trust Co.*, 242 U. S. 144, 61 L. Ed. 208, 37 Sup. Ct. 41, L. R. A. 1917E 1050; *Carolina, C. & O. R. R. v. Shewalter*, 128 Tenn. 363, L. R. A. 1916C 964, Ann. Cas. 1915C 605, 161 S. W. 1136, aff'd without opinion in 239 U. S. 630, 59 L. Ed. 476, 36 Sup. Ct. 166, (mem. dec.).

In the absence of evidence that the deceased survived his injury, no damages for his pain and suffering should be allowed, *Gilliam v. Southern Ry. Co.*, — S. C. —, 93 S. E. 865.

Section 9, was Northern Pac. R. Co. Maerkl.<sup>6</sup> In that case an employe was injured in August, 1910, by reason of the negligence of the railroad company. He brought suit for the injuries under the federal act and died shortly after the commencement of the action. The suit was revived in the name of the personal representative and damages were alleged to the deceased by reason of the injury, and also damages by reason of the death to the widow and children. A recovery for one sum was had for damages to the deceased in his lifetime and for another sum for the damages to his widow and child by reason of his death, both being included in the same verdict. The point was made that such double damages could not be recovered, but the court held that the recovery was proper. As this is one of the first cases in which this amendment of 1910 was construed, we quote the court's language in full: "The question remains whether there is substantial basis for the contention of the plaintiff in error to the effect that recovery cannot be had in the same action both for the injury sustained by the deceased and for his death, even where, as here, the action is brought by the representative of the deceased for the benefit of all of the beneficiaries. But for the amendment of the act of April 22, 1908, the position would be well taken, for that act contained no provision for the survival of the cause of action thereby given to the injured employe for personal damages sustained by him. But on the 5th day of April, 1910, Congress amended the act of April 22, 1908, by changing sec. 6 thereof, and by adding the following section as sec. 9: 'Sec. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe, and if none, then of such employe's parents, but in such cases there shall be only one recovery for the same injury.' Act April 5, 1910, c. 143, 36 Stat. 291 (Fed. Stat. Am. 1912,

6. 117 C. C. A. 237, 198 Fed. 1, approved in *St. Louis, I. M. & S. R. Co. v. Craft*, *supra*.

Supp. p. 335). It thus appears that Congress by the amendment of 1910 provided for the survival of the cause of action given by the act of April 22, 1908, to the employe for his personal injuries, and conferred that cause of action, not upon the estate of the injured employe in the event of his death, but, first, upon the surviving widow or husband and children of such employe, with the further provision that 'in such cases there shall be only one recovery for the same injury.' We are of the opinion that the plain meaning of these statutory provisions is that, where one receives an injury in the employment of a railroad company under such circumstances as entitles him or her, as the case may be, by virtue of the statute, to recover from the company damages therefor, and that such injury results in the death of the injured person, damages resulting from the personal suffering, and from such death, not only may be recovered by the personal representative of the deceased in one action, but must be recovered in one action only, if at all, for the benefit of those specified in the statute. It results that the judgment in the present case must be, and is, affirmed."

**§ 602. Damages Under Section 9 Limited to Loss and Suffering While Deceased Employe Lived.** Under the provisions of Section 9, if the injured employe lives and endures conscious pain and suffering and subsequently dies, the damages for the benefit of the beneficiaries under that section are limited to his loss and suffering while he lived, and do not include or take into consideration his premature death or what he would have earned or accomplished in the natural span of his life.<sup>7</sup> Hence, the following instruction of a trial court to a jury, it was held,<sup>8</sup> did not properly point out the method for estimating the damages due the deceased when his cause of action survived to the beneficiaries

7. *St. Louis, I. M. & S. Ry. Co. v. Craft*, 237 U. S. 648, 59 L. Ed. 1160, 35 Sup. Ct. 704.

8. *Great Northern R. Co. v. Capital Trust Co.*, 242 U. S. 144, 61 L. Ed. 208, 37 Sup. Ct. 41, L. R. A. 1917E 1050.



under Section 9: "In case you find that Ward did not die instantly from his injuries, but that he lived some appreciable length of time after the accident, then you would come to another question in the case. Under the law of the United States it is provided that any right of action given by the act of Congress in reference to injuries of this kind under such circumstances, that the right of action shall survive to the personal representatives of the deceased for the benefit of his parents, if there is no surviving widow and children. And if you should find from the evidence that Ward did not die instantly from his injuries, but that he lived some little time after he was injured, then, under the law, the plaintiff would be entitled to recover had he brought the action in his lifetime. That is, you can award such damages as, in your judgment, would be a full, fair, and reasonable compensation for the loss sustained by Ward, the deceased, would have been entitled to recover had he brought the action in his lifetime. That is, you can award such damages as, in your judgment, would be a full, fair, and reasonable compensation for the loss sustained by Ward, the deceased, by reason of the injuries he received. . . . And in that connection, it would be proper for you to consider his age, his habits of industry, his health, his ability to work, his earning capacity, and the amount he usually earned at the time he was injured, and the length of time he would probably have lived had he not been injured, using your best judgment under all the circumstances in arriving at what would be a fair compensation for his loss."

**§ 603. Loss of Future Earnings of Decedent not Included in Damages Due Beneficiaries Under Section 9.** If an employe lives an appreciable length of time after receiving an injury, and endures conscious pain and suffering, it follows, from the decisions of the United States Supreme Court cited in the foregoing paragraphs, that the personal representative may recover on behalf of the designated beneficiaries such damages as will compensate them for their own pecuniary loss, and also such damages as will be reasonably compensatory for

the pain and suffering of the injured person while he lived; but the loss of the future earnings which decedent might have earned had he lived, is not included in the damages of the beneficiaries under the federal act." "As the act now stands amended," said the court in the cited case, "there can, of course, be but one action if the injury results immediately in the employe's death, and that is the action to compensate the relatives for their financial loss because of his death. But when the injury does not result in immediate death the construction given to the act differs from that given to the state statutes, at least in this: that the right of action for the benefit of the relatives does not depend upon the instantaneous death of the employe, but will arise whenever such death does occur, providing it results from the injury; and the right which the employe himself had to bring an action will survive, so that both rights will be in existence at the same time, and may be united by the personal representative in one action. And when so united the personal representative will recover, not only compensation for such financial loss as the beneficiaries have suffered from the employe's death, but also such damages as the employe might have recovered, including those for pain and suffering, but not those for the loss of future earnings."

**§ 604. No Recovery for Pain and Suffering of Deceased by Beneficiaries Prior to 1910 Amendment.**

Under the federal act, prior to the 1910 amendment, the beneficiaries of a deceased employe could not recover for the injury and pain suffered by the deceased. The Arkansas Supreme Court sustained a verdict for separate sums on two counts, the first for pecuniary loss to the next of kin and the second for the injury and pain suffered by intestate. At the trial the defendant asked for a ruling that the plaintiff could not recover damages for pain under the second count. The state court held that the Act of Congress was supplementary to the state law and that such a verdict could be upheld under

the state law. On writ of error from the United States Supreme Court to the State supreme court, the national court held that the federal act was exclusive and superseded the state law as to all employes employed in interstate commerce and interstate carriers also engaged in such commerce, and since the only action given by the federal act was one for the benefit of the next of kin, the ruling of the state court was wrong. No attempt was made in that case to construe the effect of the 1910 amendment as the accident occurred in 1909.<sup>10</sup>

**§ 605. No Recovery of Damages under Section 9 when Death of Employee is Instantaneous.** When the injury and death of an interstate employe are so simultaneous that it cannot be said that the employe endured pain and suffering between the injury and death, there can be no recovery under section 9.<sup>11</sup> In the Shewalter case, the supreme court of Tennessee, in construing the federal act and after comparing it with the death statutes of several states, held that if the death of an employe was instantaneous, the beneficiaries, through the personal representative, could recover any and all damages caused them by the death, but, in order that there may be a recovery for additional damages under the survival amendment, the decedent must have survived the injury. In that case a father was seeking damages for the death of a son. The trial court instructed the jury that they could allow a reasonable sum for the pain and suffering of the decedent. Since the evidence disclosed that the death was instantaneous, the appellate

10. St. Louis, I. M. & S. Ry. Co. v. Hesterly, 228 U. S. 702, 57 L. Ed. 1031, 33 Sup. Ct. 703; Garrett v. Louisville & N. R. Co., 117 C. C. A. 109, 197 Fed. 715, 3 N. C. C. A. 769, aff'd in 235 U. S. 308, 59 L. Ed. 242, 35 Sup. Ct. 32.

11. Carolina, C. & O. R. R. v. Shewalter, 128 Tenn. 363, L. R. A. 1916C 964, Ann. Cas. 1915C 605,

161 S. W. 1136. See also New Orleans & N. E. R. Co. v. Harris, 246 U. S. —, 62 L. Ed. —, 38 Sup. Ct. 535, decided June 3, 1918.

"Under the Employers' Liability Act, where death is instantaneous the beneficiaries can recover their pecuniary loss and nothing more." Norfolk & W. R. Co. v. Holbrook, 235 U. S. 625, 59 L. Ed. 392, 35 Sup. Ct. 143.

court held that the instruction was erroneous for the reasons given.<sup>12</sup> In another case involving section 9 of the act, the supreme court of Minnesota reached the same conclusion, but held that testimony showing that the decedent, after the injury, moaned and breathed for ten minutes, justified the trial court in submitting the question of survival of the cause of action to the jury.<sup>13</sup> But the federal Supreme Court in the same case held that such evidence was not sufficient to justify an award of damages for the pain and suffering of the decedent.<sup>14</sup>

**§ 606. Death must be Result of Negligence before Beneficiaries can Recover under Section 1, but not under Section 9.** Under the first section of the Act of 1908, it is provided that the beneficiaries can recover "for such death \* \* \* resulting from negligence" so that the death must be proven to have resulted from the negligence. If an employe is injured while engaged in interstate commerce and thereafter dies from other causes, it is quite clear from the language of the statute that the beneficiaries cannot recover damages under the first section. But they may, however, though the personal representative, recover damages under section 9 which would include the damages recoverable by the deceased in his lifetime. Section 9 does

12. The Shewalter case was affirmed by the United States Supreme Court in a memorandum opinion (Shewalter v. Carolina, C. & O. R. Co., 239 U. S. 630, 60 L. Ed. 476, 36 Sup. Ct. 166 [mem. dec.] as follows: "Judgment affirmed, with costs, upon the authority of (1) Michigan Central Railroad v. Vreeland, 227 U. S. 59; American Railroad of Porto Rico v. Didricksen, 227 U. S. 145; Gulf, Colorado, etc., Ry. v. McGinnis, 228 U. S. 173; Garrett v. Louisville & Nashville R. R., 235 U. S. 308; St. Louis & Iron Mountain Ry. v. Craft, 237

U. S. 648; Kansas City Southern Ry. v. Leslie, 238 U. S. 599; (2); Baron v. Baltimore, 7 Peters, 243; Jack v. Kansas, 199 U. S. 372, 379-380; Brown v. New Jersey, 175 U. S. 172; Twining v. New Jersey, 211 U. S. 78, 93."

13. Capital Trust Co. v. Great Northern R. Co., 127 Minn. 144, 7 N. C. C. A. 154, 149 N. W. 14.

14. Great Northern R. Co. v. Capital Trust Co., 242 U. S. 144, 61 L. Ed. 208, 37 Sup. Ct. 41, L. R. A. 1917E 1050.

not require that the death, upon which the cause of action survives, result from the negligent act. The disputed proposition among commentators whether the beneficiaries could recover under both sections 1 and 9, in view of the clause in the statute "there shall be only one recovery for the same injury" has been decided in the affirmative.<sup>15</sup>

**§ 607. Decisions of National Courts on Measure of Damages Control.** In actions under the Federal Employers' Liability Act, the measure of damages sanctioned and approved by the United States Supreme Court controls the action of all other courts under the act.<sup>16</sup>

**§ 608. Measure of Damages in Cases of Death under Section One of the Federal Act.** In an action under the Federal Act for the death of an interstate employe, the damages under section one thereof can only be compensatory, and the measure of them is what the beneficiaries named in the statute, and no one else, or either of them, necessarily lose in or by the death of the deceased employe. The damages are limited to such loss as results to them because they have been deprived of

15. *Northern Pac. R. Co. v. Maerkl*, 117 C. C. A. 237, 198 Fed. 1; *St. Louis & S. F. R. Co. v. Conarty*, 106 Ark. 421, 155 S. W. 93. Accord: *St. Louis, I. M. & S. Ry. Co. v. Craft*, 237 U. S. 648, 59 L. Ed. 1160, 35 Sup. Ct. 704, 9 N. C. C. A. 754; *Brooks v. Yazoo & M. V. R. Co.*, 111 Miss. 793, 72 So. 227.

16. *United States. Chesapeake & O. R. Co. v. Gainey*, 241 U. S. 494, 60 L. Ed. 1124, 36 Sup. Ct. 633; *Chesapeake & O. R. Co. v. Kelly*, 241 U. S. 485, 60 L. Ed. 1117, 36 Sup. Ct. 630, 713 N. C. C. A. 673; *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. St. 865, Ann. Cas. 1916B 252; *Gulf, C. & S. F. R. Co.*

*v. McGinnis*, 228 U. S. 173, 57 L. Ed. 785, 33 Sup. Ct. 426, 3 N. C. C. A. 806.

**Kentucky.** *Louisville & N. R. Co. v. Holloway's Adm'r*, 168 Ky. 262, 181 S. W. 1126; *Nashville, C. & St. L. Ry. v. Henry*, 158 Ky. 88, 164 S. W. 310.

**Missouri.** *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156, 168 S. W. 328.

**North Carolina.** *Dooley v. Seaboard Air Line R. Co.*, 163 N. C. 454, L. R. A. 1916E 185, 79 S. E. 970.

**Tennessee.** *Nashville, C. & St. L. Ry. v. Anderson*, 134 Tenn. 666, Ann. Cas. 1917D 902, 185 S. W. 677.

a reasonable expectation of pecuniary benefits by the wrongful death of the injured employe.<sup>17</sup> In measuring these damages, the jury are at liberty to take into consideration the age, health, expectancy of the life of the deceased, his earning capacity, his character, his mode of treatment towards his family, and the amount he contributed out of his wages to them for their support, and calculate from all these facts the present value of the amount which the jury, as reasonable and practical men may find and believe the beneficiaries have lost because of the death.<sup>18</sup> If the deceased was guilty

17. **United States.** *Chesapeake & O. R. Co. v. Gainey*, 241 U. S. 494, 60 L. Ed. 1124, 36 Sup. Ct. 633; *American R. Co. of Porto Rico v. Didricksen*, 227 U. S. 145, 57 L. Ed. 456, 33 Sup. Ct. 224; *Moffett v. Baltimore & O. R. Co.*, 135 C. C. A. 607, 220 Fed. 39; *Cain v. Southern Ry. Co.*, 199 Fed. 211.

**Connecticut.** *Farley v. New York, N. H. & H. R. Co.*, 87 Conn. 328, 87 Atl. 990.

**Georgia.** *Louisville & N. R. Co. v. Paschal*, 145 Ga. 521, 89 S. E. 620; *Southern R. Co. v. Hill*, 139 Ga. 549, 77 S. E. 803.

**Kentucky.** *Davis' Adm'r v. Cincinnati, N. O. & T. P. R. Co.*, 172 Ky. 55, 188 S. E. 1061; *Pittsburgh, C., C. St. L. R. Co. v. Col-lard's Adm'r*, 170 Ky. 239, 185 S. W. 1108; *Louisville & N. R. Co. v. Thomas' Adm'r*, 170 Ky. 145, 185 S. W. 840.

**Louisiana.** *Lanis v. Illinois Cent. R. Co.*, 140 La. 1, 72 So. 783.

**Missouri.** *Smith v. Pryor*, 195 Mo. App. 259, 190 S. W. 69.

**Nebraska.** *Zitnik v. Union Pac. R. Co.*, 95 Neb. 152, 145 N. W. 344.

**New York.** *Collins v. Pennsyl-*

*vania, R. Co.*, 163 N. Y. App. Div. 452, 148 N. Y. Supp. 777.

**North Carolina.** *Raines v. Southern R. Co.*, 169 N. C. 189, 85 S. E. 294; *Dooley v. Seaboard Air Line R. Co.*, 163 N. C. 454, L. R. A. 1916E 185, 79 S. E. 970.

**Oklahoma.** *Kansas City, M. & O. R. Co., v. Roe*, 50 Okla. 105, 150 Pac. 1035.

**South Carolina.** *Bennett v. Southern Ry-Carolina Division*, 98 S. C. 42, 79 S. E. 710.

**Tennessee.** *Nashville, C. & St. L. Ry. v. Anderson*, 134 Tenn. 666, Ann. Cas. 1917D 902, 185 S. W. 677.

**Wisconsin.** *Sweet v. Chicago & N. W. R. Co.*, 157 Wis. 400, 147 1054.

18. **United States.** *Kansas City Southern R. Co. v. Leslie*, 238 U. S. 599, 59 L. Ed. 1478, 35 Sup. Ct. 844; *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 59 L. Ed. 1160, 35 Sup. Ct. 704, 9 N. C. C. A. 754; *Norfolk & W. R. Co., v. Holbrook*, 235 U. S. 625, 59 L. Ed. 392, 35 Sup. Ct. 143, 7 N. C. C. A. 814; *Garrett v. Louisville & N. R. Co.*, 235 U. S. 308, 59 L. Ed. 242, 35 Sup. Ct. 32; *American R. Co. of Porto Rico v. Birch*, 224 U. S. 547, 56 L. Ed. 879, 32

of contributory negligence, the damages should be diminished;<sup>19</sup> but if the violation by the carrier of a national statute requiring safety appliances contributes to the death or was the proximate cause thereof, then the damages are not to be diminished because of any contributory negligence.<sup>20</sup>

**§ 609. Damages Due Beneficiaries for Loss of Future Benefits Limited to Present Cash Value.** In cases of

Sup. Ct. 603; *Richmond & D. R. Co. v. Elliott*, 149 U. S. 266, 37 L. Ed. 728, 13 Sup. Ct. 837; *Philadelphia & R. R. Co. v. Marland*, 152 C. C. A. 51, 239 Fed. 1; 15 N. C. C. A. 402; *Cain v. Southern Ry. Co.*, 199 Fed. 211.

**Alabama.** *Louisville & N. R. Co. v. Fleming*, 194 Ala. 51, 69 So. 125.

**Connecticut.** *Farley v. New York, N. H. & H. R. Co.*, 87 Conn. 328, 87 Atl. 990.

**Georgia.** *Southern R. Co. v. Hill*, 139 Ga. 549, 77 S. E. 803.

**Kansas.** *Griffith v. Midland Valley R. Co.*, 100 Kan. 500, 166 Pac. 467.

**Kentucky.** *Pittsburgh, C., C & St. L. R. Co. v. Collard's Adm'r*, 179 Ky. 239, 185 S. W. 1108; *Louisville & N. R. Co. v. Holloway's Adm'r*, 168 Ky. 262, 181 S. W. 1126.

**North Carolina.** *Raines v. Southern R. Co.*, 169 N. C. 189, 85 S. E. 294.

**South Carolina.** *Thornton v. Seaboard Air Line Ry.* 98 S. C. 348, 82 S. E. 433.

**Tennessee.** *Nashville, C. & St. L. Ry. v. Anderson*, 134 Tenn. 666, Ann. Cas. 1917D 902, 185 S. W. 677.

**Utah.** *Kipros v. Uintah R. Co.*, 45 Utah 389, 146 Pac. 292.

19. **Alabama.** *Western Ry. of*

*Alabama v. Mays*, 197 Ala. 367, 72 So. 641.

**Indiana.** *Grand Trunk Western Ry. Co. v. Thrift Trust Co.*, — Ind. App. —, 115 N. E. 685.

**Kentucky.** *Louisville & N. R. Co. v. Holloway's Adm'r*, 168 Ky. 262, 181 S. W. 1126.

**Missouri.** *Yoakum v. Lusk*, — Mo. App. —, 193 S. W. 635; *Dowell v. Wabash Ry. Co.* (Mo. App.), 190 S. W. 939.

**Texas.** *Gulf, C. & S. F. Ry. Co. v. Cooper*, — Tex. Civ. App. —, 191 S. W. 579.

20. **United States.** *Baltimore & O. R. Co. v. Wilson*, 242 U. S. 295, 60 L. Ed. 312, 37 Sup. Ct. 123; *Atchison; T. & S. F. R. Co. v. Hines*, 127 C. C. A. 632, 211, Fed. 264.

**California.** *Smithson v. Atchison, T. & S. F. R. Co.*, 174 Cal. 148, 162 Pac. 111.

**Minnesota.** *La Mere v. Railway Transfer Co. of City of Minneapolis*, 125 Minn. 159, Ann. Cas. 1915C 607, 145 N. W. 1068.

**Missouri.** *Christy v. Wabash R. Co.*, 195 Mo. App. 232, 191 S. W. 241.

**North Carolina.** *Montgomery v. Carolina & N. W. R. Co.*, 169 N. C. 249, 85 S. E. 139.

**South Dakota.** *Fletcher v. South Dakota Cent. R. Co.*, 36 S. D. 401, 155 N. W. 3.

death, the beneficiaries under the statute are not entitled to a lump sum equal to what they would have received during the estimated term of their dependency upon the decedent had he lived, but their damages as to future benefits are limited to the present cash value of such aggregate amounts. Such damages are not ad-measured by multiplying the amount of the probable annual contribution which the beneficiary would have received had the decedent lived, by the number of years that the contributions would probably continue, but the law requires the jury to give a lump sum that will represent the value of such contributions at the time of the trial. This rule is based upon the theory that a given sum of money in hand is worth more than a lump sum of money payable in the future; in other words, in computing the damages recoverable for the deprivation of future benefits the compensatory nature of the statute requires that adequate allowances be made, according to the circumstances, for the earning power of money. When, therefore, loss of future benefits are shown, the verdict should be returned upon the basis of their present value only. This method of measuring future pecuniary losses was first adopted and announced by the Supreme Court in the leading case of *Chesapeake & O. R. Co. v. Kelly*,<sup>21</sup> wherein the

21. 241 U. S. 485, 60 L. Ed. 1117, 36 Sup. Ct. 630, L. R. A. 1917F 367. See also *Chesapeake & O. R. Co. v. Gainey*, 241 U. S. 494, 60 L. Ed. 1124, 36 Sup. Ct. 633.

In estimating what amount would compensate a widow for the death of her husband engaged in interstate commerce, the future benefits must be considered at their present value. An instruction, therefore, that the measure of recovery was "such an amount in damages as will fairly and reasonably compensate the widow of the said John G. Holloway, deceased, for the loss of pecuniary

benefits she might reasonably have received if the deceased had not been killed," though general, was correct. *Louisville & N. R. Co. v. Holloway*, 246 U. S. —, 62 L. Ed. —, 38 Sup. Ct. 379.

Under the Federal Act the amount of compensation to be allowed the beneficiaries is only the cash value of what the employe might reasonably have contributed to the support of the beneficiaries during the term of his life expectancy. The loss is to be ascertained or computed by discounting the lost future benefits,



court reversed the decision of the Kentucky Court of Appeals,<sup>22</sup> holding that the beneficiaries were entitled to recover a judgment for the aggregate of the sums they would probably have received from the decedent had he lived.<sup>23</sup> In the Kelly case, the defendant had requested the court to instruct the jury that the damages should be fixed at a sum which represented the present cash value of the reasonable expectation of pecuniary advantage to the beneficiaries while dependent. This instruction was refused. The Supreme Court said: "We are constrained to say that in our opinion the Court of Appeals erred in its conclusion upon this point. The damages should be equivalent to

at the fair or reasonable rate at which the money could be loaned or invested safely at interest for each year of the life expectancy. *Jones v. Kansas City S. R. Co.*, — La., —, 78 So. 568.

22. *Chesapeake & O. Ry. Co. v. Kelly's Adm'x*, 160 Ky. 296, 169 S. W. 736, 13 N. C. C. A. 673.

23. The instructions given by the trial court and approved by the Kentucky Court of Appeals but condemned by the United States Supreme Court in the Kelly case, were as follows: "(4) If the jury should find for plaintiff, they should fix the damages at such sum as would reasonably compensate the dependent members of the family of said Kelly, if any there be, for the pecuniary loss, if any, shown by the evidence to have been sustained by them, because of said Kelly's injury and death. In fixing said amount, the jury are authorized to take into consideration the evidence showing the decedent's age, habits, business ability, earning capacity, probable duration of life, and also

the pecuniary loss, if any, which the jury may find from the evidence that the dependent members of his family, if any, have sustained because of being deprived of such maintenance or support or other pecuniary advantages, if any, which the jury may believe from the evidence they would have derived from his life thereafter.

(5) If the jury find for the plaintiff they will find a gross sum for the plaintiff against the defendant which must not exceed the probable earning of Matt Kelly had he lived. The gross sum to be found for plaintiff, if the jury find for the plaintiff, must be the aggregate of the sum which the jury may find from the evidence and fix as the pecuniary loss as above described, which each dependent member of Matt Kelly's family may have sustained by his death, stating the amount awarded his widow, Addie Kelly, Matt L. Kelly, Ruth Kelly, Thomas J. Kelly, and Richard Kelly, if any for them, or any of them, but such findings in the aggregate must not exceed \$32,000."

from the continued life of the deceased. Mich. Cent. R. R. v. Vreeland, 227 U. S. 59, 70, 71; American R. R. of Porto Rico v. Didricksen, 227 U. S. 145, 149; Gulf, Colorado etc., Ry. v. McGinnis, 228 U. S. 173, 175. So far as a verdict is based upon the deprivation of future benefits, it will afford more than compensation if it be made up by aggregating the benefits without taking account of the earning power of the money that is presently to be awarded. It is self-evident that a given sum of money in hand is worth more than the like sum of money payable in the future. \* \* \* We are not in this case called upon to lay down a precise rule or formula, and it is not our purpose to do this, but merely to indicate some of the considerations that support the view we have expressed that, in computing the damages recoverable for the deprivation of future benefits, the principle of limiting the recovery to compensation requires that adequate allowance be made, according to circumstances, for the earning power of money; in short, that when future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only. We are aware that it may be a difficult mathematical computation for the ordinary jurymen to calculate interest on the deferred payments, with annual rents, and reach a present cash value. Whether the difficulty should be met by admitting the testimony of expert witnesses, or by receiving in evidence the standard interest and annuity tables in which present values are worked out at various rates of interest and for various periods covering the ordinary expectancies of life, it is not for us in this case to say. Like other questions of procedure and evidence, it is to be determined according to the law of the forum. But the question of the proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal Employers' Liability Act it must be settled

according to general principles of law as administered in the Federal courts.”

**§ 610. Subsequent Application of Doctrine of Kelly Case in State Courts.** In *Chafin v. Norfolk & W. Ry. Co.*,<sup>24</sup> the question of the excessiveness of a verdict for \$19,000 in favor of a widow and child of an employe who, at the time of his death, was 26 years old and earning about \$1,410 per annum, was presented. The decision is instructive in that it is one of the first attempts of a state court to apply the “present value” or annuity theory adopted in the Kelly case, to actions under the Federal Act. “The law requires no more of the defendant,” said the court, “than that it provide a fund which will supply the pecuniary aid to the widow and child, which they could have reasonably expected from the deceased had he lived. The view most favorable to the plaintiff is to assume that deceased would have lived 38 years, that he would have continued without interruption to earn \$1,410 per annum, and would have continued to be equally as liberal in support of his family as had been up to the time of his death. The child was not born until after its father’s death, and evidence does not disclose what part of the earnings of the deceased was spent on the wife, except in a general way and as a member of the family. Plaintiff is not entitled to recover a greater sum than will produce annually, for the wife during the 38 years life expectancy of her husband, and also for the child during a period of 21 years, the time it could reasonably expect pecuniary benefits from its father, what both would reasonably expect from the deceased had he lived, the principal sum so provided for the two beneficiaries to be exhausted by such annual payments at the expiration of the deceased’s life expectancy. In other words, such a sum as will purchase annuities equal to what they reasonably expected to receive from deceased for the

periods of 38 and 21 years, respectively. Upon this subject the Supreme Court of the United States, in a later case, has said: 'Damages under the Employers' Liability Act should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased and employee. A given sum of money in hand is worth more than the like sum payable in the future; and where a verdict is based upon the deprivation of future benefits, the ascertained amount of these should ordinarily be discounted so as to make the verdict equivalent to their present value.' *C. & O. Ry. Co. v. Kelly*, 241 U. S. 485 (36 Sup. Ct. 630, 60 L. Ed. 1117). There is nothing in the case to indicate that the child could reasonably expect to receive anything from the father, by way of support, after it reaches the age of 21 years. Therefore the verdict, under the proof as it now appears, should be based on an allowance for the wife for the full time of the husband's expectancy of life, and for the child until it reaches the age of 21 years. And the aggregate amount of the judgment should be a sum the present value of which would be equal to the future pecuniary benefits of which the wife and child were deprived by the death of the husband and father, taking into consideration the earning power of the money paid in a lump sum. Assuming that the husband would have continued to earn \$1,410 every year for 38 years, that he would have spent that sum equally for the benefit of his wife, his child, and himself, and that the sum paid at once would earn 4 per cent. per annum, it would require about \$16,000 (if our calculation is accurate, the sum of \$15,695.63) to provide the benefits the wife and child could reasonably expect from the deceased; and assuming that money would earn only 3½ per cent., it would require a little more, to wit, \$16,703.38. There is no evidence in the record respecting the earning power of money invested for a long period in good and stable securities, and it may be that neither 4 per cent nor 3½ per cent is the proper rate of interest. But any

less rate than  $3\frac{1}{2}$  per cent. we think would be unreasonably small, in view of the comparatively recent and numerous sales of large amounts of municipal bonds for permanent roads, bearing as much as 5 per cent. interest. We do not say what the net earnings of the money should be, or what portion of the fund should go to each of the beneficiaries, but the foregoing illustration is to show that, upon any reasonable hypothesis, the verdict must necessarily include something more than pecuniary loss. \$19,000 will much more than compensate the widow and child for the pecuniary loss they have sustained, and therefore we are constrained to set it aside as being excessive."

**§ 611. Statutory Action is not for the Equal Benefit of each of the Surviving Beneficiaries.** The action given to an administrator in case of the death of an employe under the federal act, is not given for the equal benefit of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss and that apportionment is for the jury to return. This principle will exclude any recovery in behalf of such as show no pecuniary loss. Where a deceased employe left a widow and four children, a suit was brought by the widow as administratrix for her benefit and all the children who were named in the petition. One of the children was a married woman residing with and being maintained by her husband. There was neither proof nor allegation that this married daughter was in any way dependent upon the deceased, nor that she had any reasonable expectation of any pecuniary benefit as a result of a continuation of his life. It was held that the court committed error in refusing to instruct the jury that they could not find any damage in favor of the married daughter.<sup>25</sup>

25. Gulf, C & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. Ed. 785, 33 Sup. Ct. 426, 3 N. C.

C. A. 806. Accord: McCoullough v. Chicago, R. I. & P. R. Co., 160 Iowa 524, 47 L. R. A. (N. S.) 23,

**§ 612. Pecuniary Loss not Dependent upon any Legal Liability of the Employee to the Beneficiaries.** The Act of Congress is for the benefit of certain specified relatives in that act mentioned and the damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries. The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived.<sup>26</sup> In a case against a common carrier by railroad under the federal act, there was evidence that the deceased had abandoned his wife and child had not lived with them or contributed to their support for many years. The trial court instructed the jury that it was the legal duty of the deceased in his lifetime to care for and support his wife and child even though he lived separate and apart from them and that the wife and child had the right to recover damages for his wrongful death independent of whether he had contributed anything to their support. The court held this instruction was wrong in that it fixed "legal duty" independent of pecuniary losses as a measure by which the jury should estimate the damages, instead of the pecuniary benefits which the wife and child might reasonably have received during his lifetime.<sup>27</sup>

**§ 613. Distribution of Amount Recovered Controlled by Federal Statute and not State Laws.** In the distribution of any money received by an administrator of a deceased employe of a common carrier by railroad killed within the terms and conditions of the federal

142 N. W. 67; Illinois Cent. R. Co. v. Doherty's Adm'r, 153 Ky. 363, 47 L. R. A. (N. S.) 31n, 155 S. W. 1119.

26. Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. Ed.

417, 33 Sup. Ct. 192, 3 N. C. C. A. 807, Ann. Cas. 1914C 176.

27. Fogarty v. Northern Pac. R. Co., 74 Wash. 397, L. R. A. 1916C 800, 133 Pac. 609.

act, a state statute of descent and distribution does not control, but the money must be paid to the beneficiaries named in the federal statute, no matter whether a recovery is had either under section 1 of the federal act or section 9.<sup>28</sup> In the Taylor case, cited, an administrator of the estate of a railroad employe brought suit under the Federal Employers' Liability Act and by consent of a court having jurisdiction over the estates of deceased persons, the administrator compromised with the railroad company and accepted a judgment of \$5,000. Under the law of the state one-half of this amount would have gone to the father and one-half to the widow of the decedent. The appellate division of the Supreme Court of New York held that the father was entitled to half of the money and the decision was affirmed by the court of appeals. But when the case reached the Supreme Court of the United States on writ of error, that court held that state laws were entirely superseded as to such a fund and that the widow was entitled to the whole sum.

**§ 614. Method of Apportioning Fund Among Beneficiaries upon a Lump Sum Settlement.** The interest of each beneficiary under the federal statute must be measured by his or her individual pecuniary loss suffered by reason of the death of the decedent.<sup>29</sup> Whether the sum due the beneficiaries is recovered by judgment or by settlement, does not alter the method of

28. *Taylor v. Taylor*, 232 U. S. 363, 58 L. Ed. 638, 34 Sup. Ct. 350, 6 N. C. C. A. 436.

29. *Kansas City Southern R. Co. v. Leslie*, 238 U. S. 599, 59 L. Ed. 1478, 35 Sup. Ct. 844, rev'g 112 Ark. 305, Ann. Cas. 1915B 834, 167 S. W. 83; *Norfolk & W. R. Co. v. Holbrook*, 235 U. S. 625, 59 L. Ed. 392, 35 Sup. Ct. 143, 7 N. C. C. A. 814, rev'g 131 C. C. A. 621, 215 Fed. 687; *Taylor v. Taylor*, 232 U. S. 363, 58 L. Ed.

638, 34 Sup. Ct. 350; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C 159; rev'g 156 N. C. 496, 72 S. E. 858; *Gulf, C. & S. F. Ry. Co. v. McGinnis*, 228 U. S. 173, 57 L. Ed. 785, 33 Sup. Ct. 426, 3 N. C. C. A. 173; *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 33 Sup. Ct. 192, Ann. Cas. 1914C 176.

apportionment among them. Where a deceased employe left a widow and child and the administrator settled with the carrier for a lump sum, the Supreme Court of North Carolina held that the amount should be apportioned between the widow and the child according to the statute of descent and distribution of that state, that is, two-thirds to the child and one-third to the widow;<sup>30</sup> but this decision is in plain conflict with the controlling opinions of the national courts holding that the fund is not distributable according to any statute of a state.<sup>31</sup> In a case before the Kentucky Court of Appeals, it appeared that the decedent left a wife and child and the administrator settled with the carrier for a lump sum. The court properly held that the apportionment should be made among the two beneficiaries on the basis of the respective periods during which they would sustain pecuniary loss.<sup>32</sup> A railroad employe,

30. In re Stone, 173 N. C. 208, 15 N. C. C. A. 665, 91 S. E. 852.

In Horton v. Seaboard A. L. R. Co., — N. C. —, 95 S. E. 883, the court conceded that its conclusions in the case of In re Stone, *supra*, were wrong.

31. Taylor v. Taylor, 232 U. S. 363, 58 L. Ed. 638, 34 Sup. Ct. 350.

32. McGarvey's Guardian v. McGarvey's Adm'r, 163 Ky. 242, 173 S. W. 765, in which the Court said: "There yet remains the question of the extent to which he is entitled to participate therein. If we were making this finding as an original proposition (that is, as a jury), the result reached might be different; but here the amount of the recovery is already ascertained and fixed, and the only question involved is the proper division of the fund in an equitable way. The widow

was about 30 years of age at the time of her husband's death, and in good health, but without means or income; and, comparing the condition and position of the pecuniary loss to both son and widow is approximately the same upon a per annum basis. Considering the pecuniary loss to each to be the same per annum, the recovery should be divided on the basis of the respective periods during which the two beneficiaries will sustain pecuniary loss. Upon this question, counsel for appellant argues that the period of pecuniary loss to the son should embrace such time, beyond the date of his attaining the age of 21 years, as would reasonably be required to educate him for the medical profession, as there is some evidence in the record that his father had expressed a determination to give him such an education; counsel insisting that to do this would require six years,



killed while engaged in interstate commerce, left surviving him no wife or child, but a father and mother. Pursuant to a settlement the carrier paid a lump sum to the administrator and the question arose as to the amount that should be apportioned to each. The court held that the damages recovered either by judgment or settlement under the federal statute were not subject to distribution among the beneficiaries under the provisions of state statutes relating to the distribution of estates of deceased persons, but that the amount of pecuniary loss of each beneficiary determined the apportionment.<sup>33</sup> "If the damages here involved," said the court, "had been the result of a recovery in court, it necessarily must have appeared in that action, based upon the considerations just mentioned, what was the amount of the pecuniary loss that had been sustained by each parent; but the damages here involved having been paid in a

and that therefore such is the period of his pecuniary loss. Counsel for appellee insists that his pecuniary loss should not be extended beyond the date of his attaining the age of 21 years, and that the period of pecuniary loss to the widow should be her expectancy of life, according to the life tables, which is 30 years. We cannot, however, agree wholly with either contention. It may be conceded that the expectations of the son may extend beyond the date of his attaining the age of 21 years, but his dependency would not, and, as that is the date of the termination of the legal liability of the father, it should, under ordinary circumstances, be the end of the period of pecuniary loss to him. The expectancy of life of the widow might be greater than that of the deceased husband, or it might be less, but her dependency for support could not extend longer than his expectancy

of life, as the support must then cease. If her life expectancy is less than that of the husband, the period of pecuniary loss would be governed by her expectancy. If her life expectancy is greater than that of her husband, then her period of pecuniary loss should be governed by his expectancy of life. In this case, from the death of John McGarvey until the date upon which Henry McGarvey will have attained the age of 21 years is 4 years and 4 months; and McGarvey's expectancy of life was 27.34 years; that of his widow being greater. And, dividing the recovery on the basis of the respective periods of pecuniary loss, the widow is entitled to 86.32 per cent. thereof, or \$4,316.00 and the son is entitled to 13.68 per cent. thereof, or \$684."

33. *Tobin v. Bruce*, — S. D. —, 162 N. W. 933.

lump sum as the result of a settlement, and both parents being entitled to participate in the same, it naturally follows that the same basis as would have guided the court and jury if settlement had not been made should be considered in making a division between these parents of the damages in the hands of the administrator. What the railway company should or might have been liable to have paid under the evidence as it appears in this case is not now involved, but it is now only the question as to what division should be made of the proceeds of the settlement as between the parents. From the evidence it appears that the father is now over 71 years of age and the mother over 61 years. Based upon considerations of age alone the mother could, in all reasonable probability, have expected more assistance from this son than the father, consequently increasing her pecuniary loss over that of the father; but it appears that she is possessed of some property which furnishes her some income, while the father depends upon his personal earnings, which must naturally decrease as he advances in years. In reality the father was more dependent on this son than the mother; his necessities for future support are stronger and more nearly upon him than hers. Of course there might be cases where the situation, financial or otherwise, of the parents, or one of them, was such that no pecuniary loss would be sustained by reason of the death of an adult son; but it is not this case. We are of the opinion and therefore hold that the parent, under all the circumstances, sustained a pecuniary loss by reason of the death of this son, and that he is entitled to a share of the proceeds of the settlement in question to be found and determined in the light of the considerations herein before mentioned. The findings of evidence before us are not sufficient for this court to say what the amount of the share of appellant should be."

**§ 615. No Presumption of Damages to Widow and Child.** The supreme court of Iowa held in an action under the federal act, that substantial damages in cases

of the death of a husband and father, would be presumed in favor of the widow and children.<sup>34</sup> The court cites authorities to sustain this proposition but this ruling seems to be in direct conflict with the decisions of the Supreme Court of the United States. It is held by that court that, even as to beneficiaries in the first of the three specified classes under the federal act, proof of pecuniary loss must both be alleged and shown.<sup>35</sup>

**§ 616. Effect of Abandonment by Husband on Right of Widow and Child to Recover.** In all actions under the federal act there must be evidence showing a reasonable expectation of pecuniary assistance or support to the beneficiaries of which they have been deprived by the death. Proof, therefore, that the decedent had abandoned his family and had failed to contribute to their support, is material. Where it appeared that a railroad employe had abandoned his wife and child sixteen years before his death, and the evidence was silent as to whether he had made any contributions for their support since the abandonment, the supreme court of South Carolina held that a motion for a directed verdict on the ground that there was no evidence that the beneficiaries sustained any pecuniary loss, was properly overruled as there was a presumption of law that a wife and minor child sustained some pecuniary loss especially since the statute of the state required the father to support his family.<sup>36</sup> "It follows, however," said the court "that, although the pecuniary right may exist, yet the deprivation of it may cause very little, or, possibly, no actual financial loss, for it may be shown from the relation, circumstances, and relative condition

34. *McCoullough v. Chicago, R. I. & P. R. Co.*, 160 Iowa 524, 47 L. R. A. (N. S.) 23, 142 N. W. 67. See also, *Garrett v. Louisville & N. R. Co.*, 117 C. C. A. 109, 197 Fed. 715.

35. *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. Ed. 785, 33 Sup. Ct. 426, 3 N. C.

C. A. 806. Accord: *Griffith v. Midland Valley R. Co.*, 100 Kan. 500, 166 Pac. 467; *Nashville, C. & St. L. Ry. v. Anderson*, 134 Tenn. 666, Ann. Cas. 1917D 902, 185 S. W. 677.

36. *Gilliam v. Southern Ry. Co.*, — S. C. —, 93 S. E. 865.

of deceased and the surviving relatives for whose benefit the action is brought that no pecuniary loss, present or prospective, resulted to them from his death." In another action where it appeared that a deceased employe had abandoned his wife and child and had not supported them for several years prior to his death, an instruction to the jury that a wife and child had the right to recover damages for the death of the husband and father, independent of whether he had contributed anything to their support, was erroneous for the reason that it ignored the question of pecuniary benefits which they might have received had he lived.<sup>37</sup>

**§ 617. Loss of Society, Companionship and Wounded Affections not Elements of Damages.** The pecuniary loss or damage which alone can be recovered under the federal act by the beneficiaries, excludes those losses which result from the deprivation of the society and companionship of the deceased, or those injuries to the affections and sentiments which arise from the death of relatives and which, though painful and grievous to be borne, cannot be measured or recompensed by money.<sup>38</sup> In the Vreeland case cited, it was held that the care and advice which the wife would have received from the husband if he had lived, was not an element of damage and threw the door open to the wildest speculation. In another case it was held that a loss to parents of the companionship of their son was not an element of

37. *Fogarty v. Northern Pac. R. Co.*, 74 Wash. 397, L. R. A. 1916C 800, 133 Pac. 609.

38. *United States v. Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 33 Sup. Ct. 192, 3 N. C. C. A. 807, Ann. Cas. 1914C 176; *Philadelphia & R. R. Co. v. Marland*, 152 C. C. A. 51, 239 Fed. 1, 15 N. C. C. A. 402; *New York C. & St. L. R. Co. v. Niebel*, 131 C. C. A. 248, 214 Fed. 952.

*Kansas. Griffith v. Midland Valley R. Co.*, 100 Kan. 500, 166 Pac. 467.

*Kentucky. Cincinnati, N. O. & T. P. R. Co. v. Claybourne's Adm'r*, 169 Ky. 315, 183 S. W. 903.

*Utah. Kipros v. Uintah R. Co.*, 45 Utah 389, 146 Pac. 292.

*Washington. Fogarty v. Northern Pac. R. Co.*, 85 Wash. 90, 11 N. C. C. A. 84, L. R. A. 1916C 803, 147 Pac. 652.

damages under the federal act.<sup>39</sup> The Supreme Court of North Carolina held that the damages recoverable by a parent for the negligent death of a son was limited under the federal act to such loss as resulted to the parents because of being deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the employe.<sup>40</sup>

**§ 618 Loss of Care, Counsel, Training and Education of Minors Proper Elements of Damages.** The care and advice which a wife would have received from her husband are not pecuniary losses within the meaning of the federal act.<sup>41</sup> When, however, the beneficiaries under the statute are minor children, the care, counsel, training and education which the child would probably have received from the parent and which can only be supplied by the service of another for compensation, are proper elements of damages under the statute.<sup>42</sup> A trial court, in an action under the federal act, instructed the jury that in measuring a minor's pecuniary loss by reason of the death of her father,

39. *American R. Co. of Porto Rico v. Didricksen*, 227 U. S. 145, 57 L. Ed. 456, 33 Sup. Ct. 224; *McCullough v. Chicago, R. I. & P. R. Co.*, 160 Iowa 524, 47 L. R. A. (N. S.) 23, 142 N. W. 67.

40. *Dooley v. Seaboard Air Line R. Co.*, 163 N. C. 454, L. R. A. 1916E-185, 79 S. E. 970.

41. *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 33 Sup. Ct. 192, Ann. Cas. 1914C 176; *St. Louis, I. M. & S. R. Co. v. Rodgers*, 118 Ark. 263, 176 S. W. 696.

42. *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 33 Sup. Ct. 192, 3 N. C. C. A. 807, Ann. Cas. 1914C 176; *St. Louis, I. M. & S. R. Co. v. Rodgers*, 118 Ark. 263, 176 S. W. 696;

*Kansas City, M. & O. R. Co. v. Roe*, 50 Okla. 105, 150 Pac. 1035; *Nashville, C & St. L. Ry. v. Anderson*, 134 Tenn. 666, Ann. Cas. 1917D 902, 185 S. W. 677.

"The elements which make up the total damage resulting to a minor child from a parent's death may be materially different from those demanding examination where the beneficiary is a spouse or collateral dependent relative; but in every instance the award must be based upon money values, the amount of which can be ascertained only upon a view of the peculiar facts presented." *Norfolk & W. R. Co. v. Holbrook*, 235 U. S. 625, 59 L. Ed. 392, 35 Sup. Ct. 143.

they might into consideration "that money value, if any, and that care, training, counsel, and education, if any, which the said Ruth Davis might reasonably have received from him, and which can only be supplied by the service of another for compensation, and of which she has been deprived by the wrongful death of her father, Oscar Davis, if any, and basing your finding, if any, only upon the evidence in this case." The Kentucky appellate court held that the foregoing instruction was erroneous on the ground that it exceeded the actual pecuniary loss defined by the national Supreme Court.<sup>43</sup> But as to this feature of the instruction, the court was plainly in error. The opinion does not, however, disclose whether the damages due the child were confined to the period of her minority. In one case a trial court on the measure of damages under the federal act charged the jury that they might take into consideration "the care, education, instruction and training which one of his (decedent's) disposition and character as disclosed by the evidence might reasonably be expected to give his children during their minority." The court further advised the jury that "neither sympathy, bereavement, affection, love nor devotion" could be considered as an element of damages. It was held that the charge as thus explained was proper.<sup>44</sup> The damages to an infant child under the national statute, it was held in another case, included the reasonable pecuniary value of the nurture, care and admonition the child would have received from the father during minority.<sup>45</sup> Damages are recoverable for the loss by a child of the care, education and counsel which he might have received from his parent.<sup>46</sup>

An instruction that the award for each child may embrace compensation for the loss of that care, counsel,

43. *Davis' Adm'r v. Cincinnati, N. O. & T. P. Co.*, 172 Ky. 55, 188 S. W. 1061.

44. *St. Louis & S. F. R. Co. v. Duke*, 112 C. C. A. 564, 192 Fed. 306.

45. *St. Louis, S. F. & T. Ry. Co. v. Geer*, — Tex. Civ. App. —, 149 S. W. 1178.

46. *Louisville & N. R. Co. v. Holloway's Adm'r*, 168 Ky. 262, 181 S. W. 1126.

training and education which it might, under the evidence, have reasonably received from its father, and which can only be supplied by the services of another for compensation, was proper.<sup>46a</sup>

**§ 619. Damages for the Estate of Decedent not Recoverable.** Under the federal act the estate of a deceased employe is not entitled to any damages by reason of his death.<sup>47</sup> A trial court instructed the jury in a suit under the federal act that they could award as damages such a sum of money as would reasonably compensate the estate of decedent for the destruction of his power to earn money, caused by his death. This charge was held by the appellate court to be erroneous, for the reason that the national statute made no provision for damages to the estate of a decedent caused by his death, the damages being confined solely to the pecuniary loss of the beneficiaries caused by the death.<sup>48</sup>

46a. *Horton v. Seaboard A. L. Ry. Co.* — N. C. —, 95 S. E. 883.

47. *Louisville & N. R. Co. v. Stewart*, 241 U. S. 261, 60 L. Ed. 989, 36 Sup. Ct. 586; *American R. Co. of Porto Rico v. Birch*, 224 U. S. 547, 56 L. Ed. 879, 32 Sup. Ct. 603; *Philadelphia & R. R. Co. v. Marland*, 15 N. C. C. A. 402 152 C. C. A. 51, 239 Fed. 1; *Louisville & N. R. Co. v. Holloway's Adm'r*, 168 Ky. 262, 181 S. W. 1126; *Illinois Cent. R. Co. v. Doherty's Adm'r*, 153 Ky. 363, 47 L. R. A. (N. S.) 31, 155 S. W. 1119; *Kamboris v. Oregon-Washington R. & N. Co.*, 75 Ore. 358, 146 Pac. 1097; *Fogarty v. Northern Pac. R. Co.*, 85 Wash. 90, 11 N. C. C. A. 84, L. R. A. 1916C 803, 147 Pac. 652.

"The object of the plaintiff's writ of error was to go behind the second trial and reinstate the first

judgment. But the verdict was found upon an instruction that the jury should find, if anything, 'such a sum as will fairly compensate his estate for his death,' — given, it would seem, in forgetfulness that the same arose under the act of Congress. See 157 Ky. 642. This instruction was excepted to, and neither justice nor law would permit the verdict and judgment based upon it to be reinstated after the state court had set it aside. We therefore examine the arguments in 904 no farther, and do not consider whether if, in our opinion, there had been no error of Federal law at the first trial, the plaintiff could have had the relief that she asks." *Louisville & N. R. Co. v. Stewart*, *supra*.

48. *Chesapeake & O. R. Co. v. Dwyer's Adm'r*, 157 Ky. 590, 163 S. W. 752.

In another case for a similar reason an instruction which permitted the recovery of damages for the benefit of the widow and children but in case the net earnings of the deceased were in excess of the sum, that such damages could be recovered by the administrator for the estate, was held erroneous under the federal act.<sup>49</sup> A similar instruction was condemned in another case for the same reason.<sup>50</sup>

**§ 620. Necessity of Evidence Showing Earnings Beneficiaries have been Deprived of.** The pecuniary loss of the beneficiaries of an employe killed while engaged in interstate commerce is not what the deceased might have earned but what part of his earnings they might reasonably have expected to receive had he lived.<sup>51</sup> Applying this rule, the supreme court of Tennessee has held that there must be evidence of pecuniary damage before such damage can be allowed by the jury.<sup>52</sup> Said the court: "This rule is enforced with more strictness by the Supreme Court of the United States perhaps than by some of the state courts in jurisdictions where acts fashioned after Lord Campbell's Act prevail. In this case deceased's age, expectancy, and earning capacity were proven. It was also proven that his wife and child were dependent upon him for support. There was no proof, however, as to

49. *Southern Ry. Co. v. Hill*, 139 Ga. 549, 77 S. E. 803.

50. *Dooley v. Seaboard Air Line R. Co.*, 163 N. C. 454, L. R. A. 1916E 185, 79 S. E. 970.

51. *Chesapeake & O. R. Co. v. De Atley*, 241 U. S. 310, 60 L. Ed. 1016, 36 Sup. Ct. 564; *Kansas City Southern R. Co. v. Leslie*, 238 U. S. 599, 59 L. Ed. 1478, 35 Sup. Ct. 844; *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 59 L. Ed. 1160, 35 Sup. Ct. 704, 9 N. C. C. A. 754; *Norfolk & W. R. Co. v. Holbrook*, 235 U. S. 625, 59 L. Ed.

392, 35 Sup. Ct. 143; 7 N. C. C. A. 814; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C 159; *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. Ed. 785, 33 Sup. Ct. 426, 3 N. C. C. A. 806; *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 33 Sup. Ct. 192, Ann. Cas. 1914C 176.

52. *Nashville, C. & St. L. R. Co. v. Anderson*, 134 Tenn. 666, Ann. Cas. 1917D 902, 185 S. W. 677.



the value of his customary contributions to the support of these beneficiaries, and nothing to indicate what such beneficiaries might reasonably have expected from him in the way of support. There was no proof of any service, pecuniarily determinable, as defined in *Michigan Central R. Co. v. Vreeland*, which deceased had rendered or might reasonably be expected to render to his wife. There was no proof as to the personal qualities of the deceased and the interest which he took in his family, and therefore no occasion to charge the jury that they might taken into consideration the care, counsel, training, and education which the child might reasonably have expected from his father. *Norfolk & W. R. Co. v. Holbrook*, *supra*. It was therefore improper for the trial judge to have submitted such matters to the jury in the absence of any evidence."

**§ 621. Award of Exemplary Damages not Permissible as to Interstate Employes.** It necessarily follows from the foregoing principles that in all actions under the Federal Employers' Liability Act, an award of exemplary damages is not permitted even if the law of the state where the injury occurred or where the suit is prosecuted, provides for punitive or exemplary damages.<sup>53</sup>

**§ 622. Funeral Expenses not Recoverable in Actions under the Federal Act.** An allowance by a jury in an action under the federal act for a sum of money for funeral expenses, was erroneous. The statute makes no provision to compensate the relatives for the expenses of burial.<sup>54</sup>

**§ 623. Necessity of Showing Contributions during Lifetime of Deceased to Beneficiaries of First and Sec-**

53. *Seaboard Air Line Ry. v. Koennecke*, 239 U. S. 352, 60 L. Ed. 324, 36 Sup. Ct. 126, 11 N. C. C. A. 352.

*Hughes*, 153 C. C. A. 627, 240 Fed. 341; *Collins v. Pennsylvania R.* 163 N. Y. App. Div. 452, 148 N. Y. Supp. 777.

54. *Delaware, L. & W. R. Co. v.*

**ond Classes.** The Supreme Court of the United States, in a leading case in which the measure of damages under the Federal Employers' Liability Act is discussed, declared that the statute on this question is essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being, that of 9 and 10 Victoria, known as the Lord Campbell Act.<sup>55</sup> The distinguishing features of that act identical with the act of Congress before the amendment of 1910 are: first, it is grounded upon the original wrongful injury of the person; second, it is for the exclusive benefit of certain specified relatives; third, the damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries.<sup>56</sup> Under statutes enacted in many of the states, creating a cause of action for death the question has frequently arisen as to whether beneficiaries similar to those in the first and second classes under the federal act may recover damages for the death when it appears that no contributions or gifts were made to them during the decedent's lifetime. Some courts, in construing such state statutes, have held that it was necessary for the plaintiff to show that the deceased, during his lifetime, gave assistance to the beneficiaries by way of money, services, or other material benefits, which, in reasonable probability, would have continued but for the death.<sup>57</sup> Other courts have sustained a find-

55. *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 33 Sup. Ct. 192, 3 N. C., C. A. 807, Ann. Cas. 1914C 176.

56. The amendment of 1910 permits the beneficiaries to recover for the loss and pain which the decedent suffered in his lifetime when the death was not instantaneous, and a conscious interval elapsed between the injury and the death. See section 601, *supra*.

57. *Arkansas. St. Louis, M. & S. E. R. Co. v. Garner*, 76 Ark. 555, 89 S. W. 550; *Fordyce v. McCants*, 51 Ark. 509, 4 L. R. A. 296, 14 Am. St. Rep. 69, 11 S. W. 494.

*California. Hillebrand v. Standard Biscuit Co.*, 139 Cal. 233, 73 Pac. 163.

*Colorado. Colorado Coal & Iron Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 251.

*Illinois. Rhoads v. Chicago & A. R. Co.*, 227 Ill. 328, 11 L. R. A.

ing that there was a reasonable expectation of pecuniary benefit although the evidence did not show that assistance was actually rendered the beneficiaries before the death.<sup>58</sup> In a pioneer opinion which has been frequently cited, the supreme court of North Carolina passed upon this question in an action under the federal act and held that the father of a brakeman, 23 years old, unmarried, strong, healthy and of good habits, was entitled to damages although the evidence did not disclose that the son had contributed anything to the father's support since reaching his majority.<sup>59</sup> In the Dooley case, the

(N. S.) 623. 10 Ann. Cas. 111; 81 N. E. 371; aff'g 130 Ill. App. 145; Chicago & A. R. Co. v. Shannon, 43 Ill. 338.

**Indiana.** Louisville, N. A. & C. Ry. Co. v. Wright, 134 Ind. 509, 34 N. E. 314; Wabash R. Co. v. Cregan, 23 Ind. App. 1, 54 N. E. 767; Diebold v. Sharp, 19 Ind. App. 474, 49 N. E. 837.

**Kansas.** Cherokee & P. Coal & Mining Co. v. Limb, 47 Kan. 469; Atchison, T. & S. F. Ry. Co. v. Brown, 26 Kan. 443.

**Maine.** McKay v. New England Dredging Co., 92 Me. 454, 43 Atl. 29.

**Michigan.** Richmond v. Chicago & W. M. Ry. Co., 87 Mich. 374, 49 N. W. 621.

**Nebraska.** Greenwood v. King, 82 Neb. 17, 116 N. W. 1128.

**Pennsylvania.** Holmes v. Pennsylvania R. Co., 220 Pa. 189, 123 Am. St. Rep. 685; 69 Atl. 597; Schnatz v. Philadelphia & R. R. Co., 160 Pa. St. 602, 28 Atl. 952; Lehigh Iron Co. v. Rupp, 100 Pa. 95.

**Texas.** St. Louis Southwestern R. Co. of Texas v. Huey, 61 Tex. Civ. App. 605, 130 S. W. 1017; Standard Light & Power Co. v. Muncey, 33 Tex. Civ. App. 416,

76 S. W. 931; San Antonio & A. P. Ry. Co. v. Long, 87 Tex. 148, 24 L. R. A. 637; 47 Am. St. Rep. 87, 27 S. W. 113; Houston & T. C. Ry. Co. v. Cowesr, 57 Tex. 293.

**Utah.** Fritz v. Western U. Tel. Co., 25 Utah. 263, 71 Pac. 209.

58. Hopper v. Denver & R. G. R. Co., 84 C. C. A. 21, 155 Fed. 273; Swift & Co. v. Johnson, 71 C. C. A. 619, 138 Fed. 867; 1 L. R. A. (N. S.) 1161; Pierce v. Conners, 20 Colo. 178, 46 Am. St. Rep. 279, 37 Pac. 721; Sieber v. Great Northern Ry. Co., 76 Minn. 269, 79 N. W. 95.

59. Dooley v. Seaboard Air Line R. Co., 163 N. C. 454, L. R. A. 1916E 185, 79 S. E. 970, in which the court said: "It would seem, then, that the construction placed upon the act by the Supreme Court of the United States is that the action may be maintained in behalf of widow, or husband, or children, or parents upon proof of a reasonable expectation of pecuniary benefit, and that, when it is for the benefit of others as next of kin, there must be proof of dependency. It may be doubted whether the courts should limit and qualify the right of action for the benefit

proof disclosed that the father was employed by another company and earning good wages; that at the

of the widow, etc., when the statute does not do so, and when the effect is to narrow the scope of the act passed for the protection of employees, so that under this construction in most cases the amount of recovery will be greatly reduced, and in many it will be nominal, but, however this may be, the language will not permit the construction that the word "dependent" relates to any of the beneficiaries except the next of kin. In the first section, after declaring the liability of the employer to the injured employee, it adds: 'or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death,' etc. The beneficiaries are divided into three classes, and it is only when there is none belonging to the first and second classes that an action may be maintained in behalf of more remote relatives, next of kin, and they must be dependent. If, then, the parent may maintain an action for the wrongful death of his son, although not dependent, if he has a reasonable expectation of pecuniary benefit from the continuance of his life, what is the meaning of this phrase, and how may the fact be proven? We follow the precedent set by Mr. Justice Lurton, who said in the *Vreeland* case: 'The statute in giving an action for the benefit of certain

members of the family of the decedent is essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being, that of 9 and 10 Victoria, known as Lord Campbell's Act,' — and who had recourse to the decisions upon the English statute and upon like statutes in different states to ascertain the meaning of the federal statute. One of the earliest cases by the English court is *Franklin v. South Eastern R. R. Co.*, 4 Hurl. & N. 511, in which Pollock, Judge, says: 'It is also clear that the damages are not to be given merely in reference to the loss of a legal right, for they are to be distributed among relations only, and not to all individuals sustaining such a loss; and accordingly the practice has not been to ascertain what benefit could have been enforced by the claimants, had the deceased lived, and give damages limited thereby. If, then, the damages are not to be calculated on either of these principles, nothing remains except that they should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life. Whether the plaintiff had any such reasonable expectation of benefit from the continuance of his son's life, and, if so, to what extent, were the questions left in this case to the jury. The proper question, then, was left, if there was any evidence in support of the affirmative of it. We think there was. The

time of the son's death, he was not dependent upon his son, but he testified that he might be in a few years if the son had lived. The evidence disclosed that the son began to work for himself when he was 21 years old, and had given his father money prior to reaching his majority, but not since. There was no evidence that he had given his father any pecuniary assistance at any

plaintiff was old and getting infirm; the son was young, earning good wages, and apparently well disposed to assist his father, and in fact he had so assisted him to the value of 3s. 6d. a week. We do not say that it was necessary that the actual benefit should have been derived; a reasonable expectation is enough; and such reasonable expectation might well exist, though, from the father not being in need, the son had never done anything for him. This case was approved in *Dalton v. S. E. Railway Co.*, 4 C. B. N. S. 303, and the latter case was cited with approval by Lord Haldane, during the present year, in *Taff Vail Ry. Co. v. Jenkins* (1913) A. C. 1, in which he says: 'The action is brought under Lord Campbell's Act by the father on behalf of himself and the mother for damages for the loss of the daughter. Now we have heard a good deal of authority cited as to what the foundation of such action is, but I do not think there is much difficulty is coming to a conclusion as to the principle which underlies those authorities. The basis is not what has been called solatium (that is to say, damages given for injured feelings or on the ground of sentiment) but damages based on compensation

for a pecuniary loss. But this loss may be prospective, and it is quite clear that prospective loss may be taken into account. It has been said that this is qualified by the proposition that the child must be shown to have been earning something before any damages can be assessed. I know of no foundation in principle for that proposition, either in statute or in any doctrine of law which is applicable; nor do I think it is really established by the authorities when you examine them. As regards the judgment in the court below, I have already indicated that in my view the real question is that which Willis, J., defines in one of the cases quoted to us, *Dalton v. South Eastern Ry. Co.* (1): 'Aye or no, was there a reasonable expectation of pecuniary damages?' These English cases decided that an action may be maintained for the benefit of the parent for the wrongful death of an adult son, when there is a reasonable expectation of pecuniary benefit from the continuance of the life of the son, and that it is not necessary to prove that the son has contributed to the support of the parent in order to establish such reasonable expectation, and the American authorities support the same decision."

time since reaching his majority. Under these facts it was held that a finding that the father had a reasonable expectation of pecuniary benefit from the continuation of the life of the son, was proper, and a motion for a judgment of nonsuit was denied.<sup>60</sup> The court appeals of Kentucky also held that the declaration by the decedent when entering the employment of the railroad company that he was going to work and expected to contribute to the support of his aged father, was sufficient to authorize a finding of damages in favor of the father even though the son made no contribution to his father's support.<sup>61</sup> In *Tobin v. Bruce*,<sup>62</sup> the court held that a father 71 years of age was entitled to damages under the federal act for the death of his son although there was no evidence that the son made any contribution to his support in his lifetime. Many cases under the federal act were reviewed. The court said: "The appellant assigns as error the finding that plaintiff sustained no pecuniary loss by reason of the death of his son and the conclusion of law that appellant was not entitled to any portion of said damages. We are of the view that the learned trial court erred in the conclusions of law. We are of the view that there is no possible legal reason why plaintiff, this appellant, should not be entitled to receive some portion of said damages. The Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. at L. 65) provides that damages awarded under said act shall be paid—in case of the death of

60. The court based its decision upon the following cases: *Franklin v. South Eastern Ry. Co.*, 4 Hurl. & N. 511; *Dalton v. South Eastern Ry. Co.*, 4 C. B. (N. S.) 303; *Taff Vail Ry. Co. v. Jenkins* (1913) A. C. 1, construing the Lord Campbell Act; and *Hopper v. Denver & R. G. R. Co.*, 84 C. C. A. 21, 155 Fed. 273. The cases of *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. Ed. 785, 33 Sup. Ct. 426, 3 N. C. C.

A. 806; *American R. Co. of Porto Rico v. Didricksen*, 227 U. S. 145, 57 L. Ed. 456, 33 Sup. Ct. 224; *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 33 Sup. Ct. 192, Ann. Cas. 1914C, 176 were also cited and quoted from in the same opinion.

61. *Pittsburgh, C., C. & St. L. R. Co. v. Collard's Adm'r*, 170 Ky. 239, 175 S. W. 1108.

62. — S. D. —, 162 N. W. 933.

such employe, to his or her personal representative for the benefit of the surviving widow or husband and children of such employe; and if none, then of such employe's parents; and if none, then of the next of kin dependent upon such employe.' It is the moral as well as the legal duty in this state of every child, whether minor or adult, to assist in the support of their indigent aged parents. Section 118, Civ. Code; *McCook County v. Kammoss*, 7 S. D. 558, 64 N. W. 1123, 31 L. R. A. 461, 58 Am. St. Rep. 854. Every parent has the right to expect, has the right to anticipate, regardless of legal duty, that in old age his or her children will, if necessary, contribute to his or her support. This expectancy—this anticipation of support, on the part of the parent—is a sufficient pecuniary loss to sustain a right to damages under the federal law in question; and it matters not whether the deceased child, prior to the time of the death of such child, had or had not, as a matter of fact, contributed to the support of the parent. It matters not whether the parent at the time of the death of the child was actually dependent upon the child for support. It is the expectancy and anticipation of such support, or dependency upon such child, that furnishes the basis for pecuniary loss on the part of the parent under the Federal Employers' Liability Act. As must be observed, this act does not require that a parent, prior to the death of the child, should have received support or have been dependent on the child, as a requisite of being entitled to receive damages under said act. It is only those who are designated in this act as 'next of kin' that must show dependency upon the deceased as a prerequisite to the right to such damages. We are of the view that the following decisions fully sustain this position: *Garrett v. L. & N. Ry.*, 197 Fed. 715, 117 C. C. A. 109; *Id.*, 235 U. S. 308, 35 Sup. Ct. 32, 59 L. Ed. 242; *Mich. Cent. Ry. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, 33 Ann. Cas. 1914C, 176; *Am. Ry. Co. v. Didricksen*, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456; *McCoullough v. C., R. I. & P. Ry.*, 160 Iowa, 524, 142 N. W. 67, 47 L.

R. A. (N. S.) 23; Hopper v. D. & R. G. Ry., 155 Fed. 273, 84 C. C. A. 21; Pittsburgh Ry. Co. v. Collard, 170 Ky. 239, 185 S. W. 1108; Dooley v. Seaboard Air Line Ry., 163 N. C. 454, 79 S. E. 970, L. R. A. 1916E, 185. In McCoullough v. Railway, *supra*, the supreme court of Iowa held that under the Employers' Liability Act, it was not legally necessary to show that the parents were dependent on the son, as in cases of 'dependent next of kin,' but that what contributions, if any, had been made by the child might be shown as affecting the measure of damages. In the case at bar there is no question as to the measure of damages involved, it is only the right to participate therein on the part of appellant. In Dooley v. Seaboard Ry., *supra*, the court held, under the act in question, that a father may recover for the death of an adult son without showing that he was dependent upon the son; proof of dependency being required only when the recovery is for the benefit of the 'next of kin.' In Pittsburgh Ry. Co. v. Collard, *supra*, being a case where the parents for seven or eight years prior to the death of the son had been divorced, and where the son after the divorce had a part of the time lived with and contributed to the support of the mother, it was held that, where the decedent had not recently lived with his father or made contributions to his support, the father was entitled to share in the damages under the Federal Employers' Liability Act."

§ 624. **Illustrative Cases Involving Sufficiency of Proof to Establish Dependency.** Some courts in passing, in particular cases, upon the sufficiency of proof of pecuniary loss to justify a recovery under the federal act, have ignored the distinction between the beneficiaries falling under the first and second classes and those under the third class as pointed out elsewhere.<sup>63</sup> While the amount recoverable under the federal act is strictly limited to the actual pecuniary loss of the

63. Section 625, *infra*.



beneficiary, yet, in an action on behalf of parents under the federal act, evidence that the decedent, their son, was of good habits, in robust health, industrious and frugal, and, in addition, when living at home, assisted his parents in performing necessary labor on a small farm upon which they lived and that he also contributed to them in cash small amounts rather infrequently but as often as their needs demanded, was sufficient to warrant some recovery.<sup>64</sup> In *McCoullough v. Chicago, R. I. & P. R. Co.*,<sup>65</sup> it appeared that the deceased was an unmarried adult son 25 years of age. He boarded and roomed with his father and mother and paid them for his room and board, and, in that way, contributed to the family. The father was a common laborer 57 years old, and the mother was 54 years old. The son had been working for the railroad company for two years. The mother testified that the son contributed to the family expenses, but whether by gifts or solely in paying for board and lodging as described, did not clearly appear. This was the entire testimony as to the pecuniary loss suffered by the parents. The court held that such evidence was not sufficient to sustain a verdict of \$5,000. In another case it appeared that a son, single, 24 years old, strong in physique, well educated, possessing good business traits, living with his wealthy parents on a large farm, left home to become a brakeman, stating that he would return to the farm to gather the crops in the autumn. He was killed while employed in interstate commerce. Before leaving his home he raised crops on the farm and lived with his father and mother as one of the family. He did not receive any fixed wages from his father who owned and cultivated the farm and who was in the habit of giving the son money whenever he desired. The father was 74 years old and growing feeble. He relied upon the deceased as the manager of his farm. The court held that these facts presented a

64. *Louisville & N. R. Co. v. Thomas' Adm'r*, 170 Ky. 145, 185 S. W. 840.      65. 160 Iowa 524, 47 L. R. A. (N. S.) 23, 142 N. W. 67.

prima facie case showing a reasonable expectation of pecuniary benefits from the continuance of the son's life which, with proof of the value of such benefits, was sufficient to justify a recovery on behalf of the father.<sup>66</sup> That a deceased railroad employe was survived by a niece, to whom he left an insurance policy of \$500.00, and a sister to whom he contributed five or six dollars a month for support of herself and daughter, and bought provisions and furniture for her home, amounting to about five dollars per month additional, constituted sufficient basis for the recovery of damages in some amount for the benefit of the sister and the niece.<sup>67</sup> Proof that a deceased railroad employe, leaving no dependents except an adult sister living in Mexico, sent her occasional gifts in his lifetime, aggregating only \$37.00, was not sufficient to sustain a verdict of \$1500.00.<sup>68</sup> That a deceased railroad employe had a sick brother to whom he had not contributed anything in his lifetime did not make the question of dependency under the federal statute a matter for the jury to pass upon for such evidence was not sufficient.<sup>69</sup> In another case the supreme court of North Carolina held that a mother may recover damages for the death of a son killed while employed in interstate commerce for a common carrier railroad if she has reasonable expectation of pecuniary benefit from the continuance of the life of the son although he had not contributed anything to her support in his lifetime.<sup>70</sup> A laboring man killed while repairing an interstate track for a railroad company, during his lifetime sent five or six dollars a week to a widowed sister in Italy who had two children. By his death the sister was deprived of this money which she had been accustomed to receive. It was held by a

66. *Garrett v. Louisville & N. R. Co.*, 117 C. C. A. 109, 197 Fed. 715, 3 N. C. C. A. 769.

67. *Bruckshaw v. Chicago, R. I. & P. R. Co.*, 173 Iowa 207, 155 N. W. 273.

68. *Smith v. Pryor*, 195 Mo.

App. 259, 190 S. W. 69.

69. *Jones v. Charleston & W. C. R. Co.*, 98 S. C. 197, 82 S. E. 415.

70. *Irvin v. Southern R. Co.*, 164 N. C. 5, 80 S. E. 78.

majority of the court, Judges Lyon and Smith dissenting, that such facts were sufficient to submit the question of dependency under the federal act to the jury.<sup>71</sup> In an action by an administrator of a railroad employe for the benefit of brothers and sisters of the deceased the evidence disclosed that the deceased left surviving him several brothers and two sisters, one a sister of charity residing in a convent who received no support from the decedent in his lifetime, and the other a married woman living in Ireland. There was some testimony that the decedent had borrowed money to send to his sister in Ireland, but whether the money was sent her in payment of a debt or for her support was not disclosed. No evidence was introduced to show that the husband in Ireland was unable to support his wife. There was no evidence that any of the brothers were dependent upon the deceased. The court held that there could be no recovery under the federal act.<sup>72</sup> A sister whom a deceased brakeman in his lifetime supported by gifts of money and by payment of board, was held to be a dependent beneficiary under the federal act.<sup>73</sup> In another action under the federal act it appeared that the decedent was a laborer and was 23 years of age at the time of his death. He had arrived in this country about two months before his death. Prior therefore he had lived with his parents in Finland. There was some evidence that he had given his parents some money. The court, in holding that there was sufficient evidence of dependency to sustain a verdict of \$2,000, said: "But taking the evidence as it is found, may we say there is no support for the amount of the verdict? Under our decisions we think there is. The facts indicate that the parents were in need of financial assistance; that the deceased had during his minority and for two years in addition given aid both in money and its equivalent, work; and that he had the

71. *Bitondo v. New York Cent. & H. River R. Co.*, 163 N. Y. App. Div. 823, 149 N. Y. Supp. 339.

72. *Illinois Cent. R. Co., v. Doherty's Adm'r*, 153 Ky. 363, 47

L. R. A. (N. S.) 131, 155 S. W. 1119.

73. *Richelieu v. Union Pac. R. Co.*, 97 Neb. 360, 149 N. W. 772.

disposition to continue the same, since from his first wages in this country he sent his father \$10.00. It is also apparent that the deceased was industrious and was earning wages, at least those of the ordinary laborer. We think these are factors from which the jury could find that in the death of their son the parents sustained a substantial pecuniary loss.<sup>74</sup>

**§ 625. Actual Dependency Either Total or Partial must be Shown by Beneficiaries of Third Class.** There are three classes of beneficiaries under the federal statute, first, the widow and children, second, parents, and third, next of kin dependant upon the deceased employe. The courts have made a distinction between beneficiaries of the third class and those of the other two classes as to the quantum of proof necessary to permit a recovery. It is only when there is no one belonging to the first and second classes that an action may be maintained in behalf of the more remote relatives, the next of kin. As the statute specifically provides that members of the third class must be dependent upon the decedent, it has been held that a recovery for their benefit will not be permitted unless a dependency either in whole or in part existed at the time of the death;<sup>75</sup> while on the other

74. *Lundeen v. Great Northern R. Co.*, 128 Minn. 332, 150 N. W. 1088.

75. *Moffett v. Baltimore & O. R. Co.*, 135 C. C. A. 607, 220 Fed. 39; *Smith v. Pryor*, 195 Mo. App. 259, 190 S. W. 69; *Collins v. Pennsylvania R. Co.*, 163 N. Y. App. Div. 452, 148 N. Y. Supp. 777; *Dooley v. Seaboard Air Line R. Co.*, 163 N. C. 454, L. R. A. 1916E 185, 79 S. E. 970.

"As an original proposition, we might, if the question was involved, be inclined to hold that the right of action in favor of those of the first and second classes did not hinge upon the fact that

they were dependent upon the employe at the time of his death, but we are now precluded from doing so, even if the question was involved upon this appeal, as the United States Supreme Court, in the case of *Railroad Co. v. McGinnis*, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. 785, held that for persons belonging to either class, to get the benefit of the statute he or she must have been a dependent upon the deceased. Regardless, however, of this holding, there can be no doubt of the fact that, in order for a member of the third class to come within the influence of the statute, he or

hand, as to the beneficiaries of the first and second classes, the plaintiff is only required to show a reasonable expectation of pecuniary benefits from a continuance of the decedent's life in order to entitle them to recover.<sup>76</sup> "It would seem, then, that the construction placed upon the act by the Supreme Court of the United States is that the action may be maintained in behalf of the widow or husband, or children, or parents upon proof of a reasonable expectation of pecuniary benefits, and that, when it is for the benefit of others as next of kin, there must be proof of dependency."<sup>77</sup> Similar

she must have been a 'dependent' upon the deceased employe. The result is we must decide whether or not Mrs. Vessell, the beneficiary under the judgment in the case at bar, was dependant upon the deceased at the time of his death; and in order to do so we must define or interpret the word 'dependent' as used in the federal statute, and which seems not to have been defined by the United States Supreme Court, though held to be a condition precedent to recovery in the McGinnis case, *supra*, and notwithstanding the purpose of the statute and the recoverable damages was discussed in the case of Mich. Cent. R. R. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176." Southern Ry. Co. v. Vessell, 192 Ala. 440, Ann. Cas. 1917D 892, 68 So. 336.

The statute provides that the recovery is for the benefit of the "next of kin dependent" and it would seem that none of the next of kin of the third class would be entitled to share in a recovery except such of them as were actually dependent upon the decedent. Collins v. Pennsylvania R.

Co., 163 N. Y. App. Div. 452, 148 N. Y. Supp. 777.

"Notwithstanding the pecuniary loss may be more or less, according to the degree of the dependency of the beneficiaries of the first and second classes upon deceased, and the amount of recovery therefore may be increased or diminished accordingly, the act does not make their right contingent upon dependency as it does that of the next of kin. Therefore, to sustain an action for the benefit of the first two classes, it need only appear that they have sustained some pecuniary loss." Berg v. Atlantic Coast Line R. Co., — S. C. —, 93 S. E. 390

76. Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. Ed. 785, 33 Sup. Ct. 426, 3 N. C. C. A. 806; American R. Co. of Porto Rico v. Didricksen, 227 U. S. 145, 57 L. Ed. 456, 33 Sup. Ct. 224; Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. Ed. 417, 33 Sup. Ct. 192, Ann. Cas. 1914C 176.

77. Dooley v. Seaboard Air Line R. Co., 163 N. C. 454, L. R. A. 1916E 185, 79 S. E. 970.

views were expressed by one of the Federal Circuit Courts of Appeals:<sup>78</sup> "The court below in directing a verdict for the defendant manifestly acted upon the theory that the mother was not entitled to recover, inasmuch as it was shown that she was married and that her husband was living and able and willing to support her; in other words, that unless she could show that she was wholly dependent upon her son for support and maintenance she would not be entitled to recover. This is tantamount to holding that the language 'next of kin dependent upon such employe' applies to the first and second classes. We think that this language is limited to the third class, and therefore does not relate to the first and second classes. It appears that the party for whose benefit this suit was instituted was in the second class. It further appears that plaintiff not only offered evidence tending to show that the mother was to some extent dependent upon her son for maintenance and support during his lifetime—which he generously furnished her—but that she had a reasonable expectation of pecuniary benefit from a continuance of decedent's life. This evidence raised a question of fact pertinent to the issues presented by the pleading, and the same should have been submitted to the jury for its determination."

**§ 626. What Constitutes Dependency as to Third Class Beneficiaries.** No comprehensive definition of the term "dependency" upon which a recovery by the beneficiaries of the third class is predicated, seems to have been attempted by the courts in construing the federal act. The word "dependent" has been differently defined and applied by state courts in construing its meaning in insurance policies, in statutes providing for a right of recovery in case of death, and in state workmen's compensation laws.<sup>79</sup> A similar diversity of

78. *Moffett v. Baltimore & O. R. Co.*, 135 C. C. A. 607, 220 Fed. 39.

145 Ala. 301, 40 So. 411.

Florida. *Duval v. Hunt*, 34 Fla. 85, 15 So. 876.

79. Alabama. *Morey v. Monk*,

Georgia. *Daniels v. Savannah*,

opinion as to the meaning of the term seems to be manifest in the few cases in which the term has been construed under the federal act. For example, it has been indicated that a person is dependent upon another when he has the moral right to rely and does rely upon such other for support, either in whole or in part.<sup>80</sup> In another action under the federal act,<sup>81</sup> the court held that a married elder sister of a deceased employe was not a dependent because she had moral claims upon the deceased or was one whom he was merely assisting in a financial way. "We are much impressed," said the court in the Vessell case, "with the holding and decision of the Washington court in the case of Bortle v. Northern Pac. R. R., supra, 60 Wash. 554, 111 Pac. 789, Ann. Cas. 1912B, 732, and from which we take the following: 'This evidence does not, in our opinion, establish such a support or dependency as is contemplated by the statute. It shows nothing more than such gifts as countless sons occasionally bestow upon their parents, with no thought of dependency, nor that it is a gift of necessity. Our statute means something more; while we do not give it such a strict construction as to say it means wholly dependent, or that the parent must have no means of support or livelihood other than the deceased, such a construction being too harsh, and not in accordance with the humane purpose of the act, nevertheless, there must be some degree of dependency, some

F. & W. Ry. Co., 86 Ga. 236, 12 S. E. 365.

**Illinois.** *Murphy v. Nowak*, 223 Ill. 301, 7 L. R. A. (N. S.) 393, 79 N. E. 112, rev'g 127 Ill. App. 125; *Alexander v. Parker*, 144 Ill. 355, 19 L. R. A. 187, 33 N. E. 183, rev'g 842 Ill. App. 455.

**Massachusetts.** *Hodnett v. Boston & A. R. Co.*, 156 Mass. 86, 30 N. E. 224.

**Minnesota.** *State ex rel. Crookston Lumber Co. v. District Court of Beltrami County*, 131 Minn. 27,

154 N. W. 509.

**New Jersey.** *Hammfill v. Pennsylvania R. Co.*, 87 N. J. L. 388, 94 Atl. 313.

**Rhode Island.** *Dazy v. Apponaug Co.*, 36 R. I. 81, 4 N. C. C. A. 594, 89 Atl. 160.

**Wisconsin.** *Ballou v. Gile*, 50 Wis. 614, 7 N. W. 561.

80. *Smith v. Pryor*, 195 Mo. App. 259, 190 S. W. 69.

81. *Southern R. Co. v. Vessell*, 192 Ala. 440, Ann. Cas. 1917D 892, 68 So. 336.

substantial dependency, a necessitous want on the part of the parent, and a recognition of that necessity on the part of the child. Such we believe to be the general interpretation of like statutes. 8 Am. & Eng. Enc. of Law (2d Ed.) 904, in speaking of like statutes, defines the correct rule as: 'There must be an actual dependency of the deceased on the part of the party claiming the right of action. The mere fact that the deceased occasionally contributed to the support of such party, in an irregular way is not sufficient, where the fact of dependency alone confers the right of action'—citing *Hodnett v. Boston, etc. R. Co.*, 156 Mass. 86, 30 N. E. 224; *Houlihan v. Connecticut River R. Co.*, 164 Mass. 555, 42 N. E. 108; and *Duvall v. Hunt*, 34 Fla. 85, 15 South. 876. 'In *Daniels v. Savannah, etc., R. Co.*, 86 Ga. 236, 12 S. E. 365, the court construes the word 'dependent' as meaning substantially, and not wholly, dependent, and says: 'The contribution to the father or mother by the child need not be wholly sufficient, but only such as is in part sufficient for such support, and that the word 'dependent' means wholly or in part dependent materially upon such child for support.' 'In *Duval v. Hunt*, supra, it is said: 'We think that, when the suit is brought by a person who bases his right to recover upon the fact that he is dependent upon the deceased for support, then he must show, regardless of any ties of relationship or strict legal right to such support, that he or she was either from the disability of age, or nonage, physical or mental incapacity, coupled with the lack of property means, dependent in fact upon the deceased for a support. There must be, when adults claim such dependency, an actual inability to support themselves, and an actual dependence upon some one else for support, coupled with a reasonable expectation of support or with some reasonable claim to support from deceased. The evidence here does not bring respondents within the statute. They were in no sense dependent upon the deceased for support. The father was able to follow a daily vocation, and, if his earnings only resulted in an average income of \$40.00 per month, that was the result of his ability to sell more goods,



and not his inability to solicit the sale. His necessity must not be judged from his unsuccessful effort to make a larger income, but from his physical ability to make the effort. Neither does an occasional contribution from a son to a parent establish a condition of dependency. There must be a substantial need on one side and a substantial . . . recognition of that need on the other side, to make out a dependency within the meaning of this statute.' See, also, case of *Hodnett v. Boston R. R. Co.*, 156 Mass. 86, 30 N. E. 224; *McCarty v. Order of Protection*, 153 Mass. 314, 26 N. E. 866, 11 L. R. A. 144, 25 Am. St. Rep. 637; *Daly v. S. & I. Company*, 155 Mass. 1, 29 N. E. 507. In the case of *Morey v. Monk*, 145 Ala. 301, 40 South. 411, while a majority of the court held that Monk was entitled to the insurance, the decision was based upon the fact that a subsequent statute of Massachusetts made him eligible to take, and it seems to have been generally agreed that he was not dependent upon Morey as defined by the policy; and the opinion is in line with the present holding, as to who is a dependent, and quotes from the case of *McCarty v. Order of Protection*, supra. We do not think that the evidence in this case shows such a substantial or material dependence of Mrs. Vessell upon the deceased as to bring the case within the influence of the federal statute. It, at most, shows that he made monthly contributions for about two years prior to his death for the benefit of the said Mrs. Vessell and a minor nephew. It also appears that the deceased was getting, in return, his board and lodging, and which was proximately worth the amount contributed to Mrs. Vessell. Mrs. Vessell, instead of being in a necessitous condition, was, as far as proof shows, in as good financial condition as when she was supporting the deceased. Her husband had employment, they had a home, and he seems to have been able to take care of the family, including the deceased up to two years prior to his death, and there is no proof that there was such a shrinkage or diminution in his earnings, or ability to earn, as to render his wife dependent upon the deceased or anyone else.

Mrs. Vessell had been like a mother to the deceased, her younger brother; and it was not only natural, but he was under a high moral duty to aid and assist her financially and otherwise, and it may be that she lost a prospective help and support, in case she came to need and want, as time and age made their impress upon herself and husband; but she was not at the time of the death of the deceased dependent upon him for a support. Had the statute intended to provide for a relative who had moral claims upon the deceased or one whom he was merely assisting, as distinguished from a 'dependent,' it would no doubt have been framed so as to include such persons as beneficiaries, but, worded as it is, it can include no one in the third class who was not a 'dependent' upon the deceased at the time of his death for a substantial, if not an entire, support, and we must construe the statute as it is, and not as we should like to see it, or so as to cover worthy and deserving claimants who do not come within the protection of same."

**§ 627. Proof of Occasional Gifts does not Create Dependency as to Beneficiaries of Third Class.** Since the beneficiaries of the third class must be dependent upon the decedent at the time of his death, mere proof that the decedent contributed sums of money at various times to the beneficiaries is not sufficient to establish dependency. "True, the act does not require that the dependency must be complete or entire. A partial dependency will be sufficient to furnish the basis of an award in some amount. But dependency, either in whole or in part, must exist. It is a state or relation. Dependence is 'the state of relying upon something or someone, as for anything necessary or desirable.' New Standard Dictionary. It has in it also something of the idea of continuity of reliance so to speak. The term 'dependent' in the statute is somewhat similar in meaning to the term used in the charter of associations which provides for the payment of benefits to persons dependent upon deceased members. 'A dependent, as

the term is used in reference to these benevolent associations, is one who is sustained by another, or *relies* for support upon the aid of another.' (italics ours). *Alexander v. Parker*, 144 Ill. 355, loc. cit. 366, 33 N. E. 183, 184 (19 L. R. A. 187). A person is dependent upon another when he has the moral right to rely and does rely upon such other for support either in whole or in part. *Murphy v. Nowak*, 223 Ill. 301, 307, 79 N. E. 112, 7 L. R. A. (N. S.) 398. Now the mere fact that deceased had at different times sent her an occasional sum does not establish dependency. The evidence, at the most, shows only that she would probably have received other sums as gifts in the future had he lived. In other words, she may have suffered a possible pecuniary loss in the death of her brother, but nothing more than that. But, while it is necessary to show only pecuniary loss in the case of a husband, wife, children, or parents, yet, in the case of one who is not in the above category, dependency must also be shown and be proved like any other fact.'<sup>82</sup>

**§ 628. Cases Declaring the True Measure of Damages and Approved by the United States Supreme Court.** In *Michigan Cent. R. Co. v. Vreeland*,<sup>83</sup> which is the leading case upon the question of the measure of damages in cases of death under the Federal Employers' Liability Act, the Supreme Court of the United States promulgated some general rules as to the measure of damages, and cited with approval cases from various courts in which it was held that the rules were properly announced by the courts in those cases.<sup>84</sup> In view of the

82. *Smith v. Pryor*, 195 Mo. App. 259, 190 S. W. 69.

83. 227 U. S. 59, 57 L. Ed. 417, 33 Sup. Ct. 192, Ann. Cas. 1914C 176.

84. The cases cited were the following: *Blake v. Midland Ry. Co.*, 18 Q. B. 93; *Seward v. Vera Cruz*, L. R. 10 App. Cas. 59; *Illinois Cent. R. Co. v. Barron*, 5

*Wall* (U. S.) 90, 18 L. Ed. 591;

*Davis v. Guarnieri*, 45 Ohio St. 470, 4 Am. St. Rep. 548, 15 N. E.

350; *Hurst v. Detroit City Ry. Co.*, 84 Mich. 539, 48 N. W. 44; *Munro*

*v. Pacific Dredging & Reclamation Co.*, 84 Cal. 515, 18 Am. St. Rep.

248, 24 Pac. 303; *Tilley v. Hudson River R. Co.*, 24 N. Y. 471, 29 N.

Y. 252, 86 Am. Dec. 297; *Schaub*

conflicting rulings of the courts of the several states as to the measure of damages under death statutes, due, no doubt, to the different language of the statutes of the several states, and in view of the further fact that such statutes do not apply and are superseded by the federal act as to interstate employes, these cases approvingly cited by the United States Supreme Court on this question, are of value to the practitioner and the courts in ascertaining the proper rules and standards in determining the measure of damages to the various beneficiaries named in the federal act. In *Davis v. Guarnieri*, cited in the notes, the court instructed the jury as follows. "In this case the plaintiff's damages, if any, should be a fair and just compensation for the pecuniary injury resulting to the husband and children from the death of Angela Guarnieri. In no case can the jury, in estimating the damages, consider the bereavement, mental anguish or pain suffered by the living for the dead. The damage is exclusively for a pecuniary loss, not a solace. The reasonable expectation of what the husband and children might have received from the deceased, had she lived, is a proper subject for the consideration of the jury, if they find for the plaintiff. What the husband and children might reasonably expect to receive by reason of the services of this woman in a pecuniary point of view, is to be taken into account in determining the amount of damages, if you find for the plaintiff. It should be said that it is the present worth as a gross sum in money, for the loss of the services of this woman, that you are to find, if you find a loss. It is that sum which in money is a compensation for what you find this woman would reasonably have saved for family. Of course, in determining this, these things are all to be considered; that is, the age, health, probability of length of life, or death, if she had not died

*v. Hannibal & St. J. R. Co.*, 106 Mo. 74, 16 S. W. 924; *Atchison, T. & S. F. R. Co. v. Wilson*, 1 C. C. A. 25, 48 Fed. 57; *Lett v. St. Lawrence & O. R. Co.*, 11 Ont.

*App. 1; Pennsylvania R. Co. v. Goodman*, 62 Pa. 329; *Louisville, N. A. & C. Ry. Co. v. Rush*, 127 Ind. 545, 26 N. E. 1010.

from taking this drug." The court held that this instruction was not open to the objection of counsel that the term "services of the family" included not only benefits financially, but also the companionship to the husband and children, instruction by way of culture, moral training and other elements of like character, which are not within the rule of pecuniary compensation. The court held that the instruction gave a sound, clear and concise statement of the true rule of damages applicable to the case. In *Munro v. Pacific Coast Dredging Company*, cited, *supra*, with approval by the Supreme Court of the United States, the court gave to the jury the following two instructions: "No. 3. If your verdict shall be for the plaintiff, such damages may be given by you as, under all the circumstances of the case, may be just, and, in determining the amount of such damages, you have the right to take into consideration the pecuniary loss, if any, suffered by the mother of Michael Stanton by his death, if you find that his mother is living. And the loss which the plaintiff is, in such a case as this, entitled to recover, is what the deceased would have probably earned and accumulated by his labor in his business or calling during the residue of his life, and which would have gone to the benefit of his mother, or heirs, or personal representative, taking into consideration his age, health, habits of industry, ability and disposition to labor, and the probability of his length of life. No. 4. I further instruct you, if, from the evidence, you should find for the plaintiff, then the measure of damages is not alone the pecuniary loss and injury sustained by the mother in the loss of her son, as just complained, but in assessing the damages given, you may, in addition, take into consideration the sorrow, grief, and mental suffering occasioned by his death to his mother, together with the loss, if any, sustained by her in being deprived of the comfort, society, support and protection of the deceased by reason of his death." The court in that case, after reviewing the English cases under the Lord Campbell Act, held that in a suit by a parent for the death of a

child, recovery can only be had for the pecuniary loss which the mother might have sustained, and that Instruction No. 4 was erroneous and should not have been given. In *Louisville, N. A. & C. Ry. Co. v. Rush*,<sup>85</sup> also cited with approval in the *Vreeland* case, the court gave to the jury this instruction in a case where the father was suing for the death of a seven year old child: 'In any form of verdict you may adopt you are required to state in writing such sum of money as you assess the plaintiff's damages at in the event that he may, under the law, be entitled to recover under the facts as found by you. I therefore, instruct you that in estimating and considering the amount of his damages you can only take into consideration the pecuniary injury, if any, that the plaintiff has sustained by the loss of services of the deceased from the time of her death until she would have reached the age of twenty-one years if she had lived. In other words, the proper measure of damages is the pecuniary value of the child's services from the time of her death until she would have attained her majority, taken in connection with her prospects in life, less her support and maintenance. You are not at liberty to consider the fact, if it be a fact, that the plaintiff has been deprived of the happiness, comfort and society of his daughter, nor can you consider any physical or mental suffering or pain which may have been incurred by the plaintiff or his family, by the deceased child, by reason of the injuries described in the complaint. You are simply to estimate the value of the child's services to the plaintiff from the time of her death until she would have attained her majority, less the cost of her support and maintenance, including clothing, boarding, schooling, and medical attendance.'" It was held by the court that in view of the instructions just quoted, that the following instruction was not erroneous, for the reason that the condition of the family should be taken into account in determining the amount of damages: "In estimating

85. 127 Ind., 545, 26 N. E. 1010.

the plaintiff's damages the jury may consider all his family at the time of the alleged accident, and take into account all the services that this child, alleged to have been killed, might reasonably have performed in his family until she attained her majority, and such services may include actual labor in helping to carry on the household affairs, and the pecuniary value of all acts of kindness and attention which it might reasonably be anticipated that she would have performed for the plaintiff and his family, until her majority, and would administer to their comfort, as well as to their necessities. But the jury should not consider acts of affection, simply, and loss of companionship. The recovery is limited by the law to the actual pecuniary loss." In *Tilley v. Hudson River R. Co.*,<sup>86</sup> another case cited with approval in the *Vreeland* case, it was held that in an action by a father, as administrator of his wife, who was killed by negligence, leaving children, the value of her earnings, and the probability that the children would have received an estate, increased by such earnings on the death and intestacy of their father, cannot be considered in estimating the damages. But the court placed this rule on the ground that under the common law, which was then in effect, the husband would inherit the property of the wife and that, therefore, any prospective inheritance to the children was too remote. It was held, however, that injury to the children in the loss of maternal nurture and education was a pecuniary one within the intent of the statute and a proper ground of damages. Defining the word "pecuniary" in such cases, the court said: "The injury to the children of the deceased by the death of the mother was a legitimate ground of damages; and we do not agree with defendant's counsel that they ought to have been nominal. The difficulty upon this point arises from the employment of the word 'pecuniary' in the statute; but it was not used in a sense so limited as to confine it to the immediate loss of money or property; for

<sup>86</sup>. 24 N. Y. 471, 29 N. Y. 252, 86 Am. Dec. 297.

if that were so, there is scarcely a case where any amount of damages could be recovered. It looks to prospective advantages of a pecuniary nature, which had been cut off by the premature death of the person from whom they would have proceeded; and the word 'pecuniary' was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though most painful and grievous to be borne, cannot be measured or recompensed by money. It includes, also, those losses which result from the deprivation of the society and companionship of relatives, which are equally incapable of being defined by any recognized measure of value. But infant children sustain a loss from the death of a parent, and especially of their mother, of a different kind. She owes them the duty of nurture and of intellectual, moral and physical training, and of such instructions as can only proceed from a mother. That is, to say the least, as essential to their future well-being in a worldly point of view and to their success in life as the instruction in letters and other branches of elementary education which they receive at the hands of other teachers who are employed for pecuniary compensation. \* \* \* The injury in these cases is not pecuniary in the very strict sense of the word, but it belongs to that class of wrongs, as distinguished from injuries, to the feelings and sentiments; and in my view, therefore, it falls within the term as used in the statute. \* \* \* The children have been deprived of that which they were entitled to receive by the wrongful act of the defendant."

**§ 629. Erroneous Instructions on Measure of Damages under Federal Act.** A trial court in an action for damages under the federal act charged the jury that "Where the persons suffering injury are the dependent widow and infant children of a deceased husband and father, the pecuniary injury suffered would be much greater than where the beneficiaries were all adults or dependents who were mere next of kin." Condemning this instruction as being improper and constituting re-



versible error, the United States Supreme Court, by Mr. Justice McReynolds, said: "It was proper, therefore, to charge that the jury might take into consideration the care, attention, instruction, training, advice, and guidance which the evidence showed he reasonably might have expected to give his children during their minority, and to include the pecuniary value thereof in the damages assessed. But there was nothing—indeed there could be nothing—to show a hypothetical injury which might have befallen some unidentified adult beneficiary or dependent next of kin. The ascertained circumstances must govern in every case. There was no occasion to compare the rights of the actual beneficiaries with those of supposed dependents; and we think the trial court plainly erred when it declared that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father the pecuniary injury suffered would be much greater than where the beneficiaries were adults or dependents who were mere next of kin. This gave the jury occasion for indefinite speculation and rather invited a consideration of elements wholly irrelevant to the true problem presented,—to indulge in conjecture instead of weighing established facts. *Merchants' Mut. Ins. Co. v. Baring*, 20 Wall. 159, 161, 22 L. Ed. 250, 251. The facts brought out during the course of the trial were adequate to constitute a strong appeal to the sympathy naturally engendered in the minds of the jurors by the misfortunes of a widow and her dependent children. In such circumstances it was especially important that the charge should be free from anything which they might construe as a permission to go outside of the evidence. It is the duty of the court in its relation to the jury to protect the parties from unjust verdicts arising from impulse, passion or prejudice, or from any other violation of lawful rights."<sup>87</sup> In another action under the federal act where there was evidence tending to show that the de-

87. *Norfolk & W. R. Co. v. 392, 35 Sup. Ct. 143, 7 N. C. C. Holbrook*, 235 U. S. 625, 59 L. Ed. A. 814.

ceased employe was guilty of contributory negligence, the court instructed the jury that if they found the defendant guilty of negligence, then in assessing damages they had a right to take into consideration all of the testimony offered upon that question and allow such damages as they might deem fair and just compensation with reference to the pecuniary injury resulting from the plaintiff's intestate to his widow, and that, in estimating the damages, they had a right to take into consideration whatever they might believe from the evidence the widow might have reasonably expected in a pecuniary way from the continued life of the intestate. Condemning this instruction as being erroneous under the federal act, one of the Illinois appellate courts said: "This instruction wholly ignored the question of contributory negligence and the duty of the jury to consider, under the statute above referred to, a diminution of damages, and the giving of the same was for that reason a reversible error."<sup>88</sup> In an action by an administrator for the benefit of a wife and two infant children under the federal act, the jury was instructed on the measure of damages that they might consider the fact that the widow was deprived of her husband's companionship and association, and the loss of home ties in a way to indicate that such matters constitute a pecuniary loss. The court further told the jury that the law attempted to be liberal with the victims of such an accident. The instruction was condemned because it did not attempt to direct the jury to distinguish between support and companionship.<sup>89</sup> A charge to a jury in an action under the federal act stating that the law had no fixed standard by which to ascertain the loss and that the sole question for the jury to determine was what loss the wife and child suffered, was declared to be erroneous for the reason that the law has fixed a standard of damages and that standard or measure is the financial benefit which might reasonably have been expected if the de-

88. Hall v. Vandalia R. Co.,  
169 Ill. App. 12.

89. New York, C. & St. L. R.  
Co., v. Niebel, 131 C. C. A. 248, 214  
Fed. 952.

ceased employe had not been killed through the negligence of the defendant.<sup>90</sup> A trial court, in an action under the federal act, instructed the jury as follows: "The measure of damages for loss of life of plaintiff's intestate is the present value of his net income and this is to be ascertained by deducting his net gross income and then estimating the present value of the accumulation from such net income, based upon this expectation of life." Condemning this instruction as being erroneous under the federal act, the supreme court of North Carolina said: "The rule for the assessment of damages laid down by his honor, while following the decisions of this court in the construction of Lord Campbell's Act, is erroneous as applied by the Supreme Court of the United States. In *American R. R. v. Didricksen*, 227 U. S. 145, 57 L. Ed. 456, that court says: 'The cause of action which was created in behalf of the injured employe would not survive his death, nor pass to his representatives. But the act, in case of the death of such an employe from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary profits by the wrongful death of the injured employe. The damage is limited strictly to the financial loss thus sustained.' This language was quoted with approval in *Railroad v. McGinnis*, 228 U. S. 175, 33 Sup. Ct. 427, 57 L. Ed. 785, and the court adds in the last case: 'In a series of cases lately decided by this court, the act in this aspect has been construed as intended only to compensate the surviving relatives of such a deceased employe for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given. The recovery must therefore be limited to compensate those relatives for whose benefit the

90. *Fogarty v. Northern Pac. R. Co.*, 74 Wash. 397, L. R. A. 1916E 800, 133 Pac. 609.

administrator sues, as are shown to have sustained some pecuniary loss.' <sup>191</sup>

**§ 630. Errorless Instructions on Measure of Damages under Federal Act.** In an action for damages by an administrator for the benefit of a mother of a deceased employe of a railroad company, the supreme court of North Carolina, in a case cited in the notes,<sup>92</sup> approved the following instructions as being accurate, correct and clear under the federal act: "The measure of damages in this case is not the measure of damages obtaining under the state practice, to-wit, the pecuniary value of the life of the intestate, during its prospective continuance, but is the measure of damages as fixed by the Federal Employers' Liability Act and is brought for the benefit of some certain person, to-wit, in this case the mother so that the measure of damages in this case is the loss in money caused the mother by reason of the death of her son. It is purely and entirely a money or financial loss. How much money has the mother been deprived of by the death of her son, computing the same at its present worth or value? It is not a question of how much the son could have made for for his own use had he lived out his allotted time, but the present value of the sum his mother might reasonably have expected to receive from his earnings during her life, for the limit of time within which she could expect to receive financial aid from her son is the time which she could reasonably be expected to live. You must not undertake to give the equivalent or the value of human life. You will allow nothing for the suffering or sorrow of either the deceased or his mother. You must not attempt to punish the railway company but endeavor to give a fair and reasonable pecuniary value for the continuation of the life of the deceased to his mother. Therefore you will consider what sum of money, paid at

91. *Dooley v. Seaboard Air Line R. Co.*, 163 N. C. 454, L. R. A. 1916E 185, 79 S. E. 970.

92. *Irvin v. Southern R. Co.*, 164 N. C. 5, 80 S. E. 78.

the present time, in a lump sum, would represent the fair value of what the mother had a reasonable right to expect, under all circumstances, to receive from the earnings of her son, had he lived until her death. As a basis on which to enable you to make your estimate, it is proper for you to consider the wages the son was receiving, the age and health of the son, the fact that the son might have married and thereby made it necessary to use all or a part of his earnings in the support of his own family; you will consider the habits, prospect in life, industry, and skill of the son, the business in which he was engaged, and its hazards as to life; you will consider how much of his earnings he spent on himself or otherwise, either for necessities or for other purposes, as distinguished from what he spent on or gave to his mother, if you find from the evidence that he contributed anything from his earnings to his mother, because the part of his wages that he spent on himself or for other purposes than that contributed to his mother, or what in the future she might reasonably expect he could contribute, would be entirely eliminated from your calculations. There is another limitation upon the amount that you will allow as damages, that is this: You will allow only the present value of what you may find the mother has lost in money because of the death of her son, for she is getting now in a lump sum that which she would have received from time to time during a future period. By this you are not to understand that you are to ascertain the number of years that the contributions to the mother from her son would probably continue, and then multiply such number of years by the amount of such probable yearly contribution, but you are to give a sum of money that will represent the present value of such contributions. The evidence you have heard as to the probable duration of the life of the mother, based upon the mortality tables of the insurance companies, is not conclusive, upon the question of the duration of her life. Such tables are submitted to you, not to control you, but merely to guide you. They are based upon averages, and there is no

certainly that any person will live the average duration of life. Now, if you answer the first issue 'yes,' to wit, that the Southern Railway is chargeable with negligence, you should first consider the question of damages, without relation to the question of contributory negligence. If you find that the plaintiff's intestate was guilty of contributory negligence, it would then be your duty to reduce the amount of damages in proportion thereto, since the act provides that damages shall be diminished in proportion to the amount of negligence attributable to the injured employee. I instruct you that this provision means this: If you find that the negligence of the two is equal (that is, that the railway company was guilty of negligence and the plaintiff's intestate was guilty of equal negligence that contributed to the injury), you will reduce the damages one-half. If you find that the plaintiff's intestate was guilty of more negligence than the railway company, then the damages should be reduced more than one-half. If he was guilty of less negligence than the railway company, then the damages should not be reduced as much as one-half." The supreme court of Oregon, in another action under the federal act,<sup>93</sup> specifically approved the following instructions as being a fair, clear and accurate declaration of the law in guiding the jury as to the effect of contributory negligence in mitigating the damages: "In this connection you have no doubt observed from the testimony, as well as from the pleadings, that the plaintiff's participation in the transaction complained of has been alleged to be negligent in character. Now the plaintiff's negligence, if you find he was negligent, is defined in the same manner as that of the defendant. If you believe from the evidence that he did an act or number of acts which a prudent engineer would not have done, or if he failed to do an act or number of acts which an ordinarily prudent engineer would have done under all the existing circumstances,

93. Pfeiffer v. Oregon-Washing- 7 N. C. C. A. 685, 144 Pac. 762.  
ton R. & Nav. Co., 74 Ore. 307,

having in view the probable danger of his receiving the injury, then I charge you that he is, with respect thereto, guilty of negligence; and if his acts, if any you find, were the proximate cause of the injury, and if you further find that the acts, if any, of the defendant and its employes were not the proximate cause of the injury, then it will be your duty to find a verdict for the defendant. And in this connection if you believe from the evidence that the plaintiff's injury was caused partly by one or more of the negligent acts of the defendant, mentioned in the complaint, and one or more of the negligent acts of the plaintiff, as mentioned in the answer, then it will be your duty to compare the same in accordance with instructions which I shall give you. In order to make clear to you what is meant by the comparison of negligence, declared by the federal law to be the duty of the jury to make, let me say that your first inquiry should be: Was the defendant guilty of negligence? Your second inquiry should be: Was the plaintiff negligent? Your third inquiry should be: In what degree did these causal negligences contribute to the accident? And I say to you, as a matter of law, that you must determine what proportion. If the plaintiff's negligence contributed or caused, we will say, the accident to the extent of one-third of the entire negligence, then the plaintiff's damages would be reduced by one-third; if to the extent of one-half, then his damages would be reduced by one-half; if to the extent of two-thirds, then his damages would be reduced by two-thirds and if his negligence was alone the cause of the accident, then of course that would wipe out the damages and your verdict would be in favor of the defendant."<sup>94</sup> In an action on behalf of parents for the death of a railroad employe, an instruction permitting both of them to recover is not error even though father

94. Instructions referring the jury to the pleadings have been held by some courts to be erroneous and this part of the instruc-

tions, in such jurisdictions, should be given to the jury in other instructions and not by referring them to the pleadings.

and mother reside together and the father supports the family.<sup>95</sup>

**§ 631. Reference in Instructions on Measure of Damages to Sum Sued for, Not Erroneous.** It is not ordinarily error for a trial court in the instruction on the measure of damages to make reference to the amount which the plaintiff is suing for as stated in the complaint or declaration.<sup>96</sup> In the Carnahan case, cited, the trial court instructed the jury that the damages recoverable might be in such sum not to exceed \$35,000 as to the jury might seem fair and just. It was contended by the defendant that the trial court, by this instruction, called the attention of the jury to a certain sum and gave judicial approval to it, by letting them understand that they could give such sum as they deemed just and fair without regard to the damages the evidence might prove; but the court held that the objection was untenable. "It is also objected that the instruction 'allowed the jury to indulge in speculation and conjecture; invited their attention to the sum of \$35,000 and allowed the jury to give such sum as damages as to them might 'seem just and fair' without stating that the damages could be only such as were proved by the evidence to have proximately resulted from the negligent act complained of.' The objection is untenable. As we have seen the court explicitly enjoined upon the jury that there must be a proximate and causal relation between the damages and the negligence of the company and the reference to the sum of \$35,000 was a limitation of the amount stated in the declaration. There could have been no misunderstanding of the purpose of the instruction."

**§ 632. State Statutes Limiting Amounts Recoverable in Death Cases Inapplicable to Interstate Employees.** Since Congress has assumed control of the rights of

95. Louisville & N. R. Co. v. Thomas' Adm'r, 170 Ky. 145, 185 S. W. 840.

96. Chesapeake & O. R. Co. v. Carnahan, 241 U. S. 241, 60 L. Ed. 979, 36 Sup. Ct. 594.



employees injured while engaged in interstate commerce and the liabilities of common carriers by railroad to them and to their beneficiaries in cases of death by the enactment of the Federal Employers' Liability Act, all laws of the state covering the same subject matter are thereby superseded.<sup>97</sup> A statute of a state, therefore, prescribing a maximum liability of \$10,000 in death cases does not apply to employees of common carriers by railroad killed while engaged in interstate commerce.<sup>98</sup> "The verdict and judgment were for \$15,000.00," said Judge Dunn in the case cited, "and it is contended that the court erred in entering judgment for more than \$10,000.00, the limit of recovery fixed by the statute of this state. It is argued that placing a limit upon the amount which can be recovered from the master for negligently causing the death of a servant is a regulation of the relation of master and servant with which Congress did not see fit to interfere in enacting the Federal Employers' Liability Act, and that therefore the limitation of the statute applies to such a cause of action. The cause of action sought to be enforced in this case was created by the federal statute. No cause of action existed at common law for damages on account of death caused by a wrongful

97. Section 16, *supra*.

98. *Devine v. Chicago, R. I. & P. R. Co.*, 266 Ill. 248, Ann. Cas. 1916B 481, 107 N. E. 595. Upon a writ of error to the national Supreme Court, the decision of the supreme court of Illinois was affirmed. *Chicago, R. I. & P. Ry. Co. v. Devine*, 239 U. S. 52, 60 L. Ed. 140, 36 Sup. Ct. 27, in which Mr. Chief Justice White, discussing this point, said: "And the same conclusion is necessary as to the second, because in substance and effect the want of merit in that proposition has by necessary intendment been so conclusively established

by the previous decisions of this court concerning the exclusive operation and effect of the Employers' Liability Act over the subject with which it deals as to exclude all ground for the contention which the proposition makes." Citing the following cases: *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 59 L. Ed. 1160, 35 Sup. Ct. 704, 9 N. C. C. A. 754; *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 33 Sup. Ct. 192, Ann. Cas. 1914C 176; *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169, 38 L. R. A. (N. S.) 44.

act. The statute of this state creating a liability in such cases had been in force for many years before the enactment by Congress of any employers' liability act. Under its provisions employers engaged in interstate commerce were liable for damages occasioned by the death of their employes while engaged in interstate commerce, caused by the negligence of such employers. This was because Congress, though having power to regulate the liability of employes engaged in interstate commerce for injuries to their employes while engaged in such commerce, had not acted on that subject. Congress having now assumed control of the subject by the enactment of the Federal Employers' Liability Act, its control is exclusive and the law of this state is no longer applicable, but the federal act alone governs."

**§ 633. State Law Giving Earnings of Minor Son to Father Applicable in Determining Pecuniary Loss.** A state law providing that a father is entitled to the earnings of his son during minority, is applicable, in proper cases, to actions under the Federal Act. In a suit by an administrator on behalf of a father for the negligent killing of his minor son while engaged in interstate commerce, such a statute justifies a recovery of some damages without any other evidence of pecuniary loss.<sup>99</sup>

**§ 634. Effect of Excessive Apportionment to one Beneficiary.** In an action under the federal act by an administrator for the benefit of the father and mother of a deceased railroad employe in which the jury awarded separate amounts to each beneficiary, the Kentucky court of appeals held that an excessive sum to one beneficiary works a reversal on the entire judgment.<sup>1</sup> "It seems to us that the Federal Employers' Liability Act," said the court in the cited case, "plainly con-

99. Minneapolis & St. L. R. Co. v. Gotschall, 244 U. S. 66, 61 L. Ed. 995, 37 Sup. Ct. 598, 14 N. C. C. A. 865.

1. Pittsburgh, C., C. & St. L. R. Co. v. Collard's Adm'r, 170 Ky. 239, 185 S. W. 1108.

templates that, even where there are two or more beneficiaries, there should be but one action, one trial, and one verdict, and that in a case like this the same jury that returns the verdict should apportion the damages. On the one hand, each beneficiary is entitled to recover the pecuniary benefits of which he has been deprived by the death. On the other hand, the defendant should not be required to pay more than the aggregate of the damages sustained by each. In order to reach a conclusion that will be fair and just to the beneficiaries, on the one hand, and the defendant, on the other, it is necessary, not only to view the claim of each beneficiary in connection with the particular facts affecting him, but to take a comprehensive survey of all the facts and circumstances bearing on the claims of all the beneficiaries and the entire liability of the defendant. This cannot be done if separate juries are permitted to find separate damages for different beneficiaries. We therefore conclude that, when the verdict is excessive, by reason of the excessive apportionment to one of the beneficiaries, the ends of justice require that the entire judgment shall be reversed for a new trial before a jury with full power to fix defendant's entire liability, and make a proper apportionment of the damages among the beneficiaries entitled to recover."

**§ 635. Remittitur may Cure Error of Failure to Reduce Damages on Account of Contributory Negligence.** Where it appears that the plaintiff was guilty of contributory negligence and the jury failed to reduce the damages to the extent of his negligence, the question whether such error may be cured by remittitur and without granting a new trial is a matter of practice under the law of the forum. Some courts, under such circumstances, have ordered remittiturs without granting a new trial.<sup>2</sup>

2. *Pennsylvania Co. v. Sheeley*, 137 C. C. A. 471, 221 Fed. 901; *Yazoo & M. V. R. Co. v. Wright*, 125 C. C. A. 25, 207 Fed. 281;

*Hadley v. Union Pac. R. Co.*, 99 Neb. 349, 156 N. W. 765; *Anest v. Columbia & P. S. R. Co.*, 89 Wash. 609, 154 Pac. 1100.

**§ 636. Propriety of Special Verdicts When Actions Involve Reduction of Damages Due to Contributory Negligence.** In some jurisdictions juries may be required to return special verdicts showing the total damages which should be assessed against the defendant and if the plaintiff's carelessness contributed to the injury, how much of the total should be reduced by reason of the plaintiff's negligence.<sup>3</sup> "In future trials under this statute, we think it is preferable that juries return special verdicts. In this way the jury can better follow the processes of arriving at the recovery. By proper questions under Code of Civil Procedure, Sec. 1187, the jury may be asked to say, for instance: If they find that defendant's negligence proximately caused this injury, what is plaintiff's total damage? If plaintiff's own want of care helped produce his injury, how much have they reduced plaintiff's damages? Thereby trials in the state court will accord with the more recently adopted method of returning verdicts under this statute in the United States district courts."<sup>4</sup>

**§ 637. Settlement with One Beneficiary does not Defeat Action by a Personal Representative.** A compromise and settlement with one beneficiary of an employe of a railroad company killed while engaged in interstate commerce, does not bar a suit by the personal representative on behalf of all the beneficiaries. Thus, during the progress of an action brought by a personal representative of a deceased employe for the benefit of the father and mother, the mother of the decedent filed an intervening petition in which she stated that she had settled with the railroad company and desired no judgment in her favor. The railroad company thereupon filed an amended answer pleading the settlement with the mother as a bar to any recovery by the administrator. A demurrer to this plea was properly

3. New York Cent. & H. River R. Co. v. Banker, 140 C. C. A. 37, 224 Fed. 351, 11 N. C. C. A. 697.

4. McAuliffe v. New York Cent. & H. River R. Co., 172 N. Y. App. Div. 597, 158 N. Y. Supp. 922.

sustained.<sup>5</sup> Said the court: "The right to bring suit carries with it the right to employ counsel and control the prosecution of the suit. Were we to hold that a beneficiary, after suit was brought, could compromise his claim, and thus defeat the action, the necessary effect would be to oust the personal representative of the control and authority conferred upon him by the statute, and confer these powers upon one who is not even a party to the action. We therefore conclude that the alleged compromise in no way affected the right of the administrator to proceed with the action to final judgment, and that the trial court did not err in so holding."

**§ 638. Damages Due Each Beneficiary May be Apportioned in the Verdict.** In all actions under the Federal Employers' Liability Act where there are several beneficiaries, the damages due each of them may be separately stated in the verdict, the apportionment being for the jury to return.<sup>6</sup> But a failure to apportion the damages in an action by an administrator for the benefit of the widow and minor child of a decedent, in the absence of a request to that effect, is not ground for the reversal of a cause.<sup>7</sup> Where the

5. *Pittsburgh, C. & St. L. R. Co. v. Collard's Adm'r*, 170 Ky. 239, 185 S. W. 1108.

6. *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. Ed. 785, 33 Sup. Ct. 426, 3 N. C. C. A. 806; *Southern R. Co. v. Smith*, 123 C. C. A. 488, 205 Fed. 360; *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156, 168 S. W. 328; *Collins v. Pennsylvania R. Co.*, 163 N. Y. App. Div. 452, 148 N. Y. Supp. 777; *Fogarty v. Northern Pac. R. Co.*, 74 Wash. 397, L. R. A. 1916C 800, 133 Pac. 609.

7. *United States. Kansas City Southern R. Co. v. Leslie*, 238 U. S. 599, 59 L. Ed. 1478, 35 Sup.

Ct. 844; *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. 865, 9 N. C. C. A. 265, Ann. Cas. 1916B 252; *Yazoo & M. V. R. Co. v. Wright*, 125 C. C. A. 25, 207 Fed. 284; *Southern R. Co. v. Smith*, 123 C. C. A. 488, 205 Fed. 360.

**Arkansas.** *St. Louis, I. M. & S. R. Co. v. Rodgers*, 118 Ark. 263, 176 S. W. 696.

**Kentucky.** *Pittsburgh, C. & St. L. R. Co. v. Collard's Adm'r*, 170 Ky. 239, 185 S. W. 1108; *Cincinnati, N. O. & T. P. R. Co. v. Claybourne's Adm'r*, 169 Ky. 315, 183 S. W. 903.

**Missouri.** *Hardwick v. Wabash*

amount due each beneficiary as apportioned, an excessive sum awarded to one, works a reversal.<sup>8</sup>

R. Co., 181 Mo. App. 156, 168 S. W. 328.

**Nebraska.** Hadley v. Union Pac. R. Co., 99 Neb. 349, 156 N. W. 765.

**Oklahoma.** St. Louis & S. F. Ry. Co. v. Clappitt, — Okla. —, 154 Pac. 40.

"Under Lord Campbell's Act (9 & 10 Vict., ch. 93, Sec. 2) and in a few of the American States the jury is required to apportion the damages in this class of cases. But even in those States the distribution is held to be of no concern to the defendant and the failure to apportion the damages is held not to be reversible error (Norfolk etc. Ry. v. Stevens, 97 Virginia, 631 (1), 634; International Ry. v. Lehman, 72 S. W. Rep. 619)—certainly not unless the defendant can show that it has been injured by such failure. The Employers' Liability Act is substantially like Lord Campbell's Act, except that it omits the requirement that the

jury should apportion the damages. That omission clearly indicates an intention on the part of Congress to change what was the English practice so as to make the Federal statute conform to what was the rule in most of the States in which it was to operate. Those statutes, when silent on the subject, have generally been construed not to require juries to make an apportionment. Indeed, to make them do so would, in many cases, double the issues; for, in connection with the determination of negligence and damage, it would be necessary also to enter upon an investigation of the domestic affairs of the deceased—a matter for Probate Courts and not for juries." Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. 865, 9 N. C. C. A. 265, Ann. Cas. 1916B 927.

8. Pittsburgh, C., C. & St. L. R. Co. v. Collard's Adm'r, 170 Ky. 239, 185 S. W. 1108.

## CHAPTER XXXII.

### CONTRACTS FORBIDDEN BY LIABILITY ACT.

- Sec. 639. The Statutory Provision.  
Sec. 640. Statute Prohibiting Carriers from Evading Liability by Contracts or Regulations, Valid.  
Sec. 641. Statute Applies to Existing as Well as Future Contracts.  
Sec. 642. Acceptance of Benefits from Employer no Bar to Suit Against Joint Tort-Fessor.  
Sec. 643. Inhibition of Section 5 Limited to Employes of the Carrier.  
Sec. 644. Release of Cause of Action for Injury not a Contract Within Section 6.

**§ 639. The Statutory Provision.** Section 5 of the Federal Employers' Liability Act declares that any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by the act, shall to that extent be void: provided, that in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employe or the person entitled thereto on account of the injury or death for which said action was brought.<sup>1</sup>

1. **United States.** Chicago, R. I. & P. R. Co. v. Bond, 240 U. S. 449, 60 L. Ed. 735, 36 Sup. Ct. 403, 11 N. C. C. A. 342; Chicago & A. R. Co. v. Wagner, 239 U. S. 452, 60 L. Ed. 379, 36 Sup. Ct. 135; Robinson v. Baltimore & O. R. Co., 237 U. S. 84, 59 L. Ed. 849, 35 Sup. Ct. 491, 8 N. C. C. A. 1; Taylor v. Wells, Fargo & Co., 136 C. C. A. 402, 220 Fed. 796; St. Louis, I. M. & S. R. Co. v. Conley, 110 C. C. A. 97, 187 Fed. 949.

**Arkansas.** Chicago, R. I. & P. R. Co. v. Pearce, 118 Ark. 6, 175 S. W. 1160.

**Kansas.** McAdow v. Kansas City Western R. Co., 100 Kan. 309, L. R. A. 1917E 539, 164 Pac. 177.

**Kentucky.** Louisville & N. R. Co. v. Winkler, 162 Ky. 843, 173 S. W. 151.

**Minnesota.** Wise v. Chicago, B. & Q. R. Co. Relief Department 133 Minn. 434, 158 N. W. 711; Rodell v. Relief Department of

**§ 640. Statute Prohibiting Carriers from Evading Liability by Contracts or Regulations, Valid.** The question of the validity of the contract provision quoted in the foregoing paragraph has been finally established by the United States Supreme Court.<sup>2</sup> In the Schubert case, the plaintiff was an employe of the defendant. The company pleaded that the plaintiff was at the time a member of its "relief fund" under a contract of membership in which it was agreed that the company should apply as a voluntary contribution from his wages a certain sum a month for the purpose of securing certain benefits and it was also stipulated that the acceptance of benefits by an employe after injury should constitute a release from all claims for damages. The plaintiff since his injury had voluntarily accepted benefits to the amount of \$75.00. A demurrer to this plea was sustained in the trial court. The appellate court held that Congress, in declaring by the statute that such contracts were void, did not exceed its authority, and affirmed the cause.

Chicago, B. & Q. R. Co., 118 Minn. 449, 137 N. W. 174.

Missouri. Hartman v. Chicago B. & Q. R. Co., 192 Mo. App. 271, 182 S. W. 148.

New Hampshire. Wilson v. Grand Trunk Ry. Insurance & Provident Society, — N. H. —, 98 Atl. 478.

North Carolina. Herring v. Atlantic Coast Line R. Co., 168 N. C. 555, 84 S. C. 863; Burnett v. Atlantic Coast Line R. Co., 163 N. C. 186, 79 S. E. 414.

Oklahoma. Patton v. Atchison, T. & S. F. Ry. Co., — Okla. —, 158 Pac. 576.

Pennsylvania. Hogarty v. Philadelphia & R. R. Co., 245 Pac 443, 91 Atl. 854.

South Carolina. Ballenger v. Southern R. Co., 106 S. C. 200, 90

S. E. 1019; Keels v. Atlantic Coast Line R. Co., 104 S. C. 497, 89 S. E. 388.

Texas. Panhandle & S. F. Ry. Co., v. Fitts, — Tex. Civ. App. —, 188 S. W. 528.

Utah. Anderson v. Oregon Short Line R. Co., 47 Utah 614, 155 Pac. 446.

2. Philadelphia, B. & W. R. Co. v. Schubert, 224 U. S. 603, 56 L. Ed. 911, 32 Sup. Ct. 589, 1 N. C. C. A. 892; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. Ed. 328, 31 Sup. Ct. 259; construing a similar provision of the statute of Iowa; Baltimore & O. R. Co. v. Gawinske, 116 C. C. A. 579, 197 Fed. 31; Burnett v. Atlantic Coast Line R. Co., 163 N. C. 186, 79 S. E. 414.



§ 641. **Statute Applies to Existing as well as Future Contracts.** The provisions of section 5 apply to contracts made before the passage of the Federal Employers' Liability Act as well as to contracts entered into after the passage of the law.<sup>3</sup> In the case cited in the notes it was contended by the railroad company that the statute did not apply to contracts entered into before the statute was enacted and that if the court should take the view that the statute applied to preexisting contracts, that the law was invalid and unconstitutional. To this contention, Mr. Justice Hughes speaking for the Supreme Court, said: "Nor can the further contention be sustained that, if so construed, the section is invalid. The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the federal authority to the continuing operation of previous contracts, would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which as to future action should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority."<sup>4</sup>

3. Philadelphia, B. & W. R. Co. v. Schubert, 224 U. S. 603, 56 L. Ed. 911, 32 Sup. Ct. 589, 1 N. C. C. A. 892.

4. In reaching this conclusion, the court cited and quoted from the following cases: Louisville &

N. R. Co., v. Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. Ed. 167, 31 Sup. Ct. 164; 31 L. R. A. (N. S.) 7; Armour Packing Co. v.

§ 642. **Acceptance of Benefits from Employer no Bar to Suit Against Joint Tort-Feasor.** Although under the laws of a state, contracts between railroad companies and their employes which provide that if an employe accept benefits from a relief fund after receiving an injury, are deemed valid, yet, if such carrier and the employe were at the time of his injuries engaged in interstate commerce, the acceptance of benefits is not a bar in an action against a joint tort-feasor.<sup>5</sup> In the case cited, the plaintiff was injured while working on his employer's cars which were being moved over another company's tracks, the latter being the owner and the former the licensee. The actionable negligence was in permitting a semaphore post to be placed too close to the track. The plaintiff accepted his relief benefits from the company which employed him and sued the other company. The other company set up as a defense that he had accepted the benefits under his contract and that having therefore released one tort-feasor, the other was not liable. But the Supreme Court of Illinois held that since the federal act provided that such contracts were no longer a defense when the company was engaged in and the injured servant employed in interstate commerce, that such defense, although valid under the laws of the state, could not inure to the benefit of the joint tort-feasor.

§ 643. **Inhibition of Section 5 Limited to Employes of the Carrier.** The provision of Section 5 of the act prohibiting any carrier from attempting to exempt itself from liability under the statute by any contract, rule, regulation, or devise whatsoever is limited to its own employes and not to others. A contract, therefore, between a porter of a sleeping car company and his employer in which he released and discharged all railroad

United States, 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct. 428; *Ad-dyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136, 20 Sup. Ct. 96.

5. *Wagner v. Chicago & A. R. Co.*, 265 Ill. 245, Ann. Cas. 1916A 778, 106 N. E. 809. (*Cartwright and Dunn, JJ., dissenting.*)

companies over whose lines the cars of the sleeping car company might be operated, from all claims for liability on account of any personal injury, was valid because the porter was not an employe of the railroad company.<sup>6</sup> "We think it to be clear", said Mr. Justice Hughes in the case cited, "that in employing its servants the Pullman Company did not act as the agent of the Railroad Company. The service provided by the Pullman Company was, it is true, subject to the exigencies of railroad transportation, and the Railroad Company had the control essential to the performance of its functions as a common carrier. To this end the employes of the Pullman Company were bound by the rules and regulations of the Railroad Company. This authority of the latter was commensurate with its duty, and existed only that it might perform its paramount obligation. With this limitation, the Pullman Company supplied its own facilities and for this purpose organized and controlled its own service, including the service of porters; it selected its servants, defined their duties, fixed and paid their wages, directed and supervised the performance of their tasks, and placed and removed them at its pleasure."

**§ 644. Release of Cause of Action for Injury not a Contract Within Section 6.** An employe who has a claim against a common carrier for personal injuries, may agree upon a settlement of his claim and accept a sum of money or other thing of value in settlement of said claim. In the absence of fraud or concealment he is concluded by such a settlement.<sup>7</sup> Such a release is not

6. Robinson v. Baltimore & O. R. Co., 237 U. S. 84, 59 L. Ed. 849, 35 Sup. Ct. 491, 8 N. C. C. A.

1.

7. United States. Chicago & N. W. R. Co. v. Wilcox, 54 C. C. A. 147, 116 Fed. 913.

Arkansas. Kansas City Southern R. Co. v. Armstrong, 115 Ark. 123, 171 S. W. 123.

Iowa. Nason v. Chicago, R. I. & P. R. Co., 140 La. 533, 118 N. W. 751.

Minnesota. Nelson v. Minneapolis St. Ry. Co., 61 Minn. 167, 63 N. W. 486; Doty v. Chicago, St. P. & K. C. Ry. Co., 49 Minn. 499, 52 N. W. 135.

Utah. Viallett v. Consolidated R. & Power Co., 30 Utah 260,

a contract, regulation or device, the purpose and intent of which is to enable the common carrier to exempt itself from liability under the statute.<sup>8</sup> In the Anderson case, cited, the court said: "Counsel refers to the Federal Employers' Liability Statute, wherein the foregoing language occurs. It will be remembered that in the act just referred to, employes, except for certain purposes, are exempt from the defenses of contributory negligence and assumed risk. The act therefore provides that an employe may not be shorn of its benefits in that regard by any 'contract, regulation or device.' It would seem that such a result would be implied even though it were not expressed in the act. The mere fact that it is expressed, however, in no way affects its scope or effect. The purpose of the foregoing provision was not to prevent the employer and his employe from compromising and settling any matters of difference existing between them. In making such a settlement, if it is fair and free from fraud, concealment, etc., no rights of either of the parties are frittered away, but, on the contrary, are firmly maintained. The right to make a compromise and settlement and enter into a release is a right of contract which, in our judgment, cannot be interfered with even by Congress. Of course, Congress may deprive the employer of his common law defenses, and may prevent an indirect enforcement thereof; but it may not prevent the employe from adjusting his own affairs in his own way after a cause of action has arisen in his favor, so long as such adjustment is fair and violates neither public policy nor some proper and enforceable statutory provision." The provision of section 5 has reference to contracts made by the parties prior to the injury. There is nothing in the statute preventing the parties from agreeing upon the terms of a settlement after the cause of action has arisen out of the injury.<sup>9</sup>

5 L. R. A. (N. S.) 663, 84 Pac. 496.

8. Anderson v. Oregon Short Line R. Co., 47 Utah 614, 155 Pac. 446.

9. Bellenger v. Southern Ry. Co., — S. C. —, 90 S. E. 1019.

## CHAPTER XXXIII.

### STATUTE OF LIMITATION.

- Sec. 645. Statutory Provision.
- Sec. 646. Institution of Suit Within Specified Time a Condition precedent to Recovery.
- Sec. 647. Plea of Limitation not Required When Record Shows Filing of Suit after Lapse of Two Years.
- Sec. 648. Limitation Period may not be Avoided by Estoppel or Fraudulent Representations.
- Sec. 649. Insanity of Injured Employee cannot operate to Extend Time for Filing Suit.
- Sec. 650. When Cause of Action under Federal Act Accrues in Death Cases.
- Sec. 651. Time of Commencement of Action a Question of Procedure.
- Sec. 652. Error to Submit Question of Limitation to Jury When Facts Appear Without Dispute.

§ 645. **Statutory Provision.** It is provided in section 6 of the Employers' Liability Act that no action shall be maintained under the statute unless commenced within two years from the day the cause of action accrued. This limitation applies to all actions against railroad companies brought by employees for injuries received while employed in interstate commerce and while the carrier was so engaged.<sup>1</sup>

§ 646. **Institution of Suit Within Specified Time a Condition Precedent to Recovery.** The right to recover damages by an employee engaged in interstate commerce, against a common carrier by railroad, exists only by virtue of the statute and the scope and effect of such right must be determined therefrom. The language of the statute makes it plain that the right and the correlative liability thereby established are conditional on the bringing of the suit within two years from the day the cause of action accrued. The institution of the suit, therefore, within the specified time is a condition to the exercise of the right, and, if the condition is not

1. Shannon v. Boston & M. R. R., 77 N. H. 349, 92 Atl. 167.

complied with, the parties stand, with respect to the wrongful act, as though the statute had not been enacted. The limitation relates, not merely to the remedy, but to the right.<sup>2</sup>

**§ 647. Plea of Limitation Not Required When Record Shows Filing of Suit after Lapse of Two Years.** The rule sometimes applied that a limitation does not operate by its own force as a bar, but as a defense, and that the party making such a defense must plead the statute if he wishes the benefit of its provisions, does not apply to statutes creating a new liability with a right to sue within a time fixed. When the liability and the remedy are created by the same act, the time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone.<sup>3</sup> In an action under the federal act, it appeared that the suit was brought after two years from the day the cause of action accrued and the defendant objected, but the state appellate court held that the limitation of two years could not be relied upon by the defendant un-

2. *Seaboard Air Line Ry. Co. v. Renn*, 241 U. S. 290, 60 L. Ed. 1006, 36 Sup. Ct. 567; *Atlantic Coast Line R. Co. v. Burnette*, 239 U. S. 199, 60 L. Ed. 226, 36 Sup. Ct. 75; *American R. Co. of Porto Rico v. Coronas*, 144 C. C. A. 599, 230 Fed. 545.

3. *Phillips Co. v. Grand Trunk Western R. Co.*, 236 U. S. 662, 59 L. Ed. 774, 35 Sup. Ct. 444; *Davis v. Mills*, 194 U. S. 451, 48 L. Ed. 1067, 24 Sup. Ct. 692; *Slater v. Mexican Nat. R. Co.*, 194 U. S. 120, 48 L. Ed. 900, 24 Sup. Ct. 581; *Finn v. United States*, 123 U. S. 227, 31 L. Ed. 128, 8 Sup. Ct. 82; *The Harrisburg*, 119 U. S. 199, 30 L. Ed. 358, 7 Sup. Ct. 140; *McNiel v. Holbrook*, 12 Pet. (U. S.) 84, 9 L. Ed. 1009.

"Matters respecting the remedy—such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought. *McNiel v. Holbrook*, 12 Pet. 89. But matters of substance and procedure must not be confounded because they happen to have the same name. For example, the time within which a suit is to be brought is treated as pertaining to the remedy. But this is not so, if, by the statute giving the cause of action, the lapse of time not only bars the remedy, but destroys the liability." *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. 865, Ann. Cas. 1916B 252.

less it was pleaded.<sup>4</sup> On writ of error to the national Supreme Court, the cause was reversed, the court holding that if the record disclosed a lapse of time in instituting the action after which the act declares no action shall be maintained, the suit must fail although the defendant did not plead the statute of limitation.<sup>5</sup> "The second objection," said the court, "was met by deciding that the limitation of two years imposed by sec. 6 could not be relied upon for want of a plea setting it up. It would seem a miscarriage of justice if the plaintiff should recover upon a statute that did not govern the case, in a suit that the same act declared too late to be maintained. A right may be waived or lost by a failure to assert it at the proper time, *Burnet v. Desmornes* 226 U. S. 145, but when a party has meant to insist on all the right it might have, such a result would be unusual and extreme. The record shows a case to which the Act of 1908 did not apply, *Winfree v. Northern Pacific Ry.*, 227 U. S. 296, and which the earlier Act of 1906 probably could not affect. *Employers' Liability Cases*, 207 U. S. 463, 489. It also shows that the action was brought too late, and that the defendant insisted upon that point, although it had not pleaded what was apparent on the allegations of the declaration and the admissions of the answer. In dealing with the enactments of a paramount authority, such as Congress is, within its sphere, over the States, we are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure. *Central Vermont Railway v. White*, 238 U. S. 507, 511. But irrespective of the fact that the act of Congress is paramount, when a law that is relied on as a source of an obligation in tort, sets a limit to the existence of what it creates, other jurisdictions naturally have been disinclined to press the obligation farther. *Davis v. Mills*,

4. *Burnette v. Atlantic Coast Line R. Co.*, 163 N. C. 186, 79 S. E. 414.

5. *Atlantic Coast Line R. Co. v. Burnette*, 239 U. S. 199, 60 L. Ed. 226, 36 Sup. Ct. 75.

194 U. S. 451, 454. The Harrisburg, 119 U. S. 199. There may be special reasons for regarding such obligations imposed upon railroads by the statutes of the United States as so limited. Phillips v. Grand Trunk Western Ry. Co., 236 U. S. 662, 667. At all events the act of Congress creates the only obligation that has existed since its enactment in a case like this, whatever similar ones formerly may have been found under local law emanating from a different source. Winfree v. Northern Pacific Ry., 227 U. S. 296, 302. If it be available in a state court to found a right, and the record shows a lapse of time after which the act says that no action shall be maintained, the action must fail in the courts of a State as in those of the United States."

**§ 648. Limitation Period may not be Avoided by Estoppel or Fraudulent Representations.** The federal statute creates a new liability unknown to the common law and fixes the time within which an action may be commenced. The time within which a suit must be brought operates as a limitation of the liability itself and is a condition attached to the right to sue. The well recognized rule that when a defendant, who relies upon an ordinary statute of limitation, has previously been guilty of deception or violation of duty towards the plaintiff causing him to subject his claim to the statutory bar, he will not be permitted to take advantage of his own wrong and thus defeat the plaintiff, has no application to statutes where the liability and the remedy are created by the same statute and the limitations of the remedy are to be treated as limitations of the right.<sup>6</sup> A plea, therefore, in an action commenced after two years, that the suit was not commenced within the two year period because of certain fraudulent representations made to the plaintiff by the defendant which caused him to defer the filing of the suit, cannot operate as an estoppel against the defendant in an action under the Federal Employers' Liability Act.<sup>7</sup>

6. Morrison v. Baltimore & O. R. Co., 40 App. Cas. (D. C.) 391.

7. Bement v. Grand Rapids & I. Ry. Co., 194 Mich. 64, L. R. A.



**§ 649. Insanity of Injured Employee Cannot Operate to Extend Time for Filing Suit.** As the statute provides that no action shall be maintained unless commenced within two years from the day the cause of action accrued, and as there is no provision in the federal act for extending or tolling the time beyond the two year limit, the fact that the injured employee became insane immediately after the accident will not operate to permit his guardian to institute an action after the two year period.<sup>8</sup> "We think the statute," said the court in the case cited, "would not be tolled until such time as the next friend might elect to sue. The plaintiff's rights are governed by the federal Employers' Liability Act. The Supreme Court of the United States in *Atlantic Coast Line Railroad Co. v. Burnette*, 239 U. S. 199, 36 Sup. Ct. 75, 60 L. Ed. 226, holds that the provision of that act is not a mere statute of limitation. Any statute of a state suspending the operation of the statute of limitation in that state is inapplicable. *Kavanagh v. Folson* (C. C.) 181 Fed. 401. There being no exception in the federal act, extending the time within which a suit for a personal injury by an employee of a railroad engaged in interstate commerce can be brought, in the event of his insanity, courts are not at liberty to apply state statutes extending or tolling the time for filing suit, or extending the time for bringing the suit by judicial construction. The rule would be otherwise if this were a suit in one state for a liability accruing in another state, where the state law would be involved and the rule of limitation is controlled by the *lex fori*. But the federal Employers' Liability Act under which this suit is brought is equally the law of all the states, and there is not provided in the act, or in the federal statutes, a saving against the time for filing the suit as to insanity."

1917E 322, 160 N. W. 424.

The infancy of the plaintiff does not suspend the statute of limitations under the federal act. *Gillette v. Delaware, L. & W. R. Co.*,

— N. J. —, 102 Atl. 673.

8. *Alvarado v. Southern Pac. Co.*, — Tex. Civ. App. —, 193 S. W. 1108.

**§ 650. When Cause of Action under Federal Act Accrues in Death Cases.** A hopeless diversity of opinion exists among the courts in construing state statutes giving rights of actions for death as to whether statutes of limitation begin to run from the day of the death or from the subsequent date of the appointment of an administrator. Some of the cases pro and con involving such state statutes are cited in the notes.\* Whether an action under the federal act must be brought within two years of the date of the death of an employe or within two years from the appointment of an administrator, has not been specifically decided by the national Supreme Court; though it seems to have been taken for granted in *Missouri, K. & T. R. Co. v. Wulf*<sup>10</sup> that the statute began to run from the time the death occurred. The supreme court of Oklahoma decided in an action where an employe was injured and subsequently died, that a cause of action accrued from the day of the death and not from the date of the injury.<sup>11</sup> A federal district court also held that a cause of action

9. **United States.** *Dodge v. Town of North Hudson*, 188 Fed. 489; *Winfree v. Northern Pac. R. Co.*, 97 C. C. A. 392, 173 Fed. 65.

**Connecticut.** *Radezky v. Sargent & Co.*, 77 Conn. 110, 58 Atl. 709; *Andrews v. Hartford & N. H. R. Co.*, 34 Conn. 57.

**Georgia.** *Glover v. Savannah, F. & W. Ry. Co.*, 107 Ga. 34, 32 S. E. 876.

**Indiana.** *Hanna v. The Jeffersonville R. Co.*, 32 Ind. 113.

**Iowa.** *McBride v. Burlington, C. R. & N. Ry. Co.*, 97 Ia. 91, 59 Am. St. Rep. 395, 66 N. W. 73.

**Kentucky.** *Louisville & N. R. Co. v. Simrall's Adm'r*, 31 Ky. Law. Rep. 1269, 104 S. W. 1011; *Carden v. Louisville & N. R. R.*, 101 Ky. 113, 39 S. W. 1027; *Louisville & N. R. Co. v. Sanders*, 86 Ky. 259, 5 S. W. 563.

**Missouri.** *Rutter v. Missouri Pac. Ry. Co.*, 81 Mo. 169.

**New York.** *Crapo v. City of Syracuse*, 183 N. Y. 395, 76 N. E. 465; *Sanford v. Sanford*, 62 N. Y. 553.

**North Carolina.** *Hall v. Southern R. Co.*, 149 N. C. 108, 62 S. E. 899; *Gulledge v. Seaboard Air Line R. Co.*, 147 N. C. 234, 125 Am. St. Rep. 544, 60 S. E. 1134.

**Tennessee.** *Whaley v. Catlett*, 103 Tenn. 347, 53 S. W. 131.

**West Virginia.** *Hoover's Adm'r v. Chesapeake & O. Ry. Co.*, 46 W. Va. 268, 33 S. E. 224.

10. 226 U. S. 570, 57 L. Ed. 355, 33 Sup. Ct. 135, Ann. Cas. 1914B 134.

11. *Lindsay v. Chicago, R. I. & P. Ry. Co.*, — Okla. —, 155 Pac. 1173.

for damages for the death of an employe under the national statute accrued when he was killed.<sup>12</sup> The Federal Circuit Court of Appeals for the 1st Circuit, on the other hand, decided that a cause of action under the federal act did not accrue until the appointment of an administrator and that, therefore, the statute of limitation did not run from the day of the death.<sup>13</sup>

**§ 651. Time of Commencement of Action a Question of Procedure.** The question whether the time of the filing of a complaint under the federal act or the time service is had upon the defendant constitutes the "commencement" of an action for damages under section 6, is a matter of procedure to be determined by the law of the jurisdiction where the suit is prosecuted. This rule was applied in a case where the cause of action accrued on June 4, 1912. Service was had upon the defendant on April 20, 1914, but the complaint was not filed in the clerk's office until June 17th of the same year, more than two years after the time the cause of action accrued. A statute of the state where the suit was prosecuted provided that in determining when a suit is barred on account of any statute of limitation, the action shall be deemed commenced when the complaint is filed. Applying this rule, the court held that the cause of action under the federal act was barred.<sup>14</sup>

**§ 652. Error to submit Question of Limitation to Jury When Facts Appear Without Dispute.** It is error to submit to the jury the question whether the action was commenced within two years from the day the cause of action accrued where the facts are beyond dispute. Thus, in an action where it appeared that the declaration was filed on February 1, 1915 and that the injury

12. Bixler v. Pennsylvania R. Co., 201 Fed. 553.

13. American R. Co. of Porto Rico v. Coronas, 144 C. C. A. 599, 230 Fed. 545, 12 N. C. C. A. 545.

An action for the death of an interstate employe accrues from the date of the death and not from

the date of appointment of an administrator. Giersch v. Atchison, T. & S. F. R. Co., — Kas. —, 171 Pac. 591.

14. Murker v. Northern Pac. Ry. Co., — Wash. —, 163 Pac. 756.

occurred on September 30, 1912, the court erred in submitting to the jury the question whether more than two years had elapsed from the time of the alleged injury to the time of bringing suit.<sup>15</sup>

15. Seaboard Air Line Ry. Co. v. Hess, — Fla. —, 74 So. 500.

## CHAPTER XXXIV.

### JURISDICTION OF STATE AND FEDERAL COURTS.

- Sec. 653. Actions may be Brought in Federal Courts.
- Sec. 654. Suits under Federal Act may Also be Prosecuted in State Courts.
- Sec. 655. Causes Instituted in State Courts not Removable to Federal Courts.
- Sec. 656. Removability when Petition States Cause of Action under both State Law and Federal Act in Separate Courts.
- Sec. 657. Contrary Decisions by other Federal Courts.
- Sec. 658. When Petition Does not State Cause of Action Under Federal Act Although so Intended.
- Sec. 659. Judgment of Highest State Court in Action under Federal Act may be Reviewed by United States Supreme Court, When.
- Sec. 660. Remedy by Writ of Error Excluded in Certain Cases by Amendatory Act of 1916.
- Sec. 661. Record must Show Right under Federal Laws was Specially Set up and Denied by State Court.
- Sec. 662. Contention that there is or is not Sufficient Evidence to Show Liability, Will Support Writ of Error.
- Sec. 663. Power to Review does not Extend to Questions Merely Incidental and Non-Federal in Character.
- Sec. 664. Ruling of State Court that Federal Question was Sufficiently Raised Binding upon United States Supreme Court.
- Sec. 665. Federal Questions to Support Writ of Error to United States Supreme Court, Need not be Raised by the Pleadings.
- Sec. 666. Foregoing Rule Subsequently Qualified, Limited and Explained.
- Sec. 667. Pleading Federal Act and Submitting Case to Jury Under State Law, no Denial of Federal Right.
- Sec. 668. When Petition not Stating a Good Cause of Action under Federal Act Raises a Federal Question.
- Sec. 669. Claim that Verdict is Excessive not Reviewable by Writ of Error.
- Sec. 670. Pleading and Practice in State Courts Under Employers' Liability Statute not Federal Questions.
- Sec. 671. State Law Requiring Facts Showing Applicability of Federal Act to be Pleaded no Denial of Federal Right.
- Sec. 672. Refusal of Trial Court to Take Case from Jury Will not be Disturbed by National Supreme Court Unless Palpably Erroneous.

**§ 653. Actions May be Brought in Federal Courts.**  
One of the 1910 amendments to the Federal Employers'  
(1145)

Liability Law, now section 6 of the act, provides that an action may be brought under the act in a circuit (district) court of the United States in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action.<sup>1</sup> The federal act allows the plaintiff to determine whether he shall begin his action in the district where the defendant resides, where the cause of action arose, or where the defendant was doing business at the time of the commencement of the action, even though inconvenience may result from bringing the action in a district where neither party resides and where the cause of action did not arise.<sup>2</sup>

**§ 654. Suits Under Federal Act May Also be Prosecuted in State Courts.** One of the amendments of 1910 to the federal act further provides that the jurisdiction of the courts of the United States under the act shall be concurrent with that of the courts of the several states, and no case arising under the act and brought in any state court of competent jurisdiction, shall be removed to any court of the United States.<sup>3</sup> Prior to the passage of the

1. *Connelly v. Central R. Co. of New Jersey*, 238 Fed. 932; *Hogan v. New York Cent. & H. River R. Co.*, 139 C. C. A. 328, 223 Fed. 890, 12 N. C. C. A. 1050; *Illinois Cent. R. Co. v. Rogers*, 136 C. C. A. 530, 221 Fed. 52; *Yazoo & M. V. R. Co. v. Mullins*, 115 Miss. 343, 76 So. 147; *White v. Missouri Pac. Ry. Co. (Mo.)* 178 S. W. 83.

Under general order number 18 and 18a of the Director General of railroads under the Federal Control Act 1918, suits must be brought where the plaintiff resided or where the cause of action accrued. See appendix Q, *infra*.

2. *Connelly v. Central R. Co. of New Jersey*, 238 Fed. 932.

3. *United States. Southern R. Co. v. Lloyd*, 239 U. S. 496, 60 L. Ed. 402, 36 Sup. Ct. 210; *Kansas City Southern R. Co. v. Leslie*, 238 U. S. 599, 59 L. Ed. 1478, 35 Sup. Ct. 844; *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169, 1 N. C. C. A. 875; *St. Louis, I. M. & S. R. Co. v. Conley*, 110 C. C. A. 97, 187 Fed 949

*Arkansas. Midland Valley R. Co. v. Lemoyne*, 104 Ark. 327, 148 S. W. 654.

*Illinois. Walton v. Pryor*, 276 Ill. 563, 115 N. E. 2.

*Indiana. Southern R. Co. v. Howerton*, 182 Ind. 208, 105 N. E. 1025, 106 N. E. 369.

1910 amendment the supreme court of Connecticut had held that state courts had no jurisdiction of actions under the Federal Employers' Liability Act.<sup>4</sup> But the federal Supreme Court subsequently held that state courts had jurisdiction of actions under the Employers' Liability Act even before the amendment of 1910.<sup>5</sup> "The law is settled that courts of general jurisdiction in the several States have power to decide cases involving the rights of litigants under the Constitution or statutes of the United States unless deprived of the right so to do by terms of the federal Constitution

**Iowa.** McCoullough v. Chicago, R. I. & P. Ry. Co., 160 Iowa 524, 142 N. W. 67; Bradbury v. Chicago R. I. & P. Ry. Co., 149 Iowa 51, 128 N. W. 1.

**Kentucky.** Chesapeake & O. R. Co. v. Shaw, 168 Ky. 537, 182 S. W. 653; Louisville & N. R. Co. v. Holloway's Adm'r, 168 Ky. 262, 181 S. W. 1126.

**Massachusetts.** Corbett v. Boston & M. R. R., 219 Mass. 351, 9 N. C. C. A. 691, 107 N. E. 60.

**Michigan.** Holmberg v. Lake Shore & M. S. R. Co., 188 Mich. 605, 155 N. W. 504.

**Minnesota.** Bennett v. Great Northern R. Co., 115 Minn. 128, 131 N. W. 1066.

**Missouri.** Hardwick v. Wabash R. Co., 181 Mo. App. 156, 168 S. W. 328.

**New Jersey.** Parker v. Atlantic City R. Co., 87 N. J. L. 148, 93 Atl. 574.

**North Carolina.** Renn v. Seaboard Air Line R. Co., 170 N. C. 128, 86 S. E. 964.

**Oklahoma.** Chicago, R. I. & P. R. Co. v. McBee, 45 Okla. 192, 145 Pac. 331; Missouri K. & T. R. Co. v. Lenahan, 39 Okla. 283, 135 Pac. 383.

**Oregon.** Kamboris v. Oregon-

Washington R. & Nav. Co., 75 Ore. 358, 146 Pac. 1097.

**Pennsylvania.** Gollinger v. Pennsylvania R. Co., 237 Pa. 152, 85 Atl. 129.

**Texas.** De Rivera v. Atchison, T. & S. F. Ry. Co., — Tex. Civ. App. — 3 N. C. C. A. 788, 149 S. W. 223.

**Virginia.** Chesapeake & O. R. Co. v. Carnahan, 118 Va. 46, 86 S. E. 863.

**Washington.** Killes v. Great Northern R. Co., 93 Wash. 416, 161 Pac. 69.

**West Virginia.** Easter v. Virginian R. Co., 76 W. Va. 383, 11 N. C. C. A. 101, 86 S. E. 37.

When their jurisdiction as prescribed by the state law is adequate, it is the right and the duty of state courts to accept jurisdiction and enforce the provisions of the Federal Employers' Liability Act, *Holmberg v. Lake Shore & M. S. Ry. Co.*, *supra*.

4. *Hoxie v. New York, N. H. & H. R. Co.*, 82 Conn. 352, 17 Ann. Cas. 324, 73 Atl. 754.

5. In re Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169. 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44.

or acts of Congress; and such decisions of the State courts are conclusive upon the parties unless reversed upon writ of error in the Supreme Court of the United States or after a removal of the case to the federal courts in accordance with the acts of Congress. The very right to a writ of error to a court of last resort of one of the states from the Supreme Court of the United States, is grounded upon the fact that the former court *has made a decision* adverse to the party suing out the writ of error, upon some federal right or immunity possessed by him.'"<sup>6</sup>

**§ 655. Causes Instituted in State Courts Not Removable to Federal Courts.** Although the statute by the amendment of 1910 plainly declares that no case arising under the federal act and brought in a state court of competent jurisdiction shall be removable to the federal courts, yet many attempts have been made to remove such cases without, however, any success. Courts have declared that the right of removal from a state court by a foreign citizen is a right which may be taken away by Congress or given to a litigant. A cause solely under the federal act filed since the amendment of 1910 is not removable because of diversity of citizenship or any other ground.<sup>7</sup>

6. Bond, J., in *Fish v. Chicago*, R. I. & P. R. Co., 263 Mo. 106, 8 N. C. C. A. 538, Ann. Cas. 1916B 147, 172 S. W. 340.

7. **United States.** *Southern R. Co. v. Lloyd*, 239 U. S. 496, 60 L. Ed. 402, 36 Sup. Ct. 210; *Kansas City Southern R. Co. v. Leslie*, 238 U. S. 599, 59 L. Ed. 1478, 35 Sup. Ct. 844; *Martin v. New York, N. H. & H. R. Co.*, 241 Fed. 696; *Pones v. Southern Ry. Co.*, 236 Fed. 584; *Peek v. Boston & M. R. R.*, 223 Fed. 448; *Lombardo v. Boston & M. R. R.*, 223 Fed. 427; *Burnett v. Spokane, P. & S. Ry.*

*Co.*, 210 Fed. 94; *Patton v. Cincinnati, N. O. & T. P. Ry.*, 208 Fed. 29; *Teel v. Chesapeake & O. R. Co. of Virginia*, 123 C. C. A. 240, 204 Fed. 918, 47 L. R. A. (N. S.) 21; *Kelly's Adm'x. v. Chesapeake & O. Ry. Co.*, 201 Fed. 602; *De Atley v. Chesapeake & O. Ry. Co.*, 201 Fed. 591; *McChesney v. Illinois Cent. R. Co.*, 197 Fed. 85; *Hulac v. Chicago & N. W. Ry. Co.*, 194 Fed. 747; *Lee v. Toledo, St. L. & W. Ry. Co.*, 193 Fed. 685; *Saick v. Pennsylvania R. Co.*, 193 Fed. 303; *Symonds v. St. Louis & S. E. Ry. Co.*, 192 Fed. 353.



**§ 656. Removability when Petition States Cause of Action under both State Law and Federal Act in Separate Counts.** A question of some difficulty has presented itself to the courts in determining whether a cause is removable in which the plaintiff has pleaded a cause of action under the state law in one count and under the federal act in another, the other jurisdictional grounds, such as diversity of citizenship, being present in the case. It was held by a federal district court in New York that although the facts pleaded in the petition showed a cause of action under the federal act and also under the state law, it was, nevertheless, a case arising under the Federal Employers' Liability Act and was not removable from the state courts notwithstanding the existence of diversity of citizenship.<sup>8</sup> In another case before the same court it was held that since such a petition stated but one cause of action under the decision of the state courts, the cause was not removable.<sup>9</sup> The court, however, said: "In short, by pleading facts bringing the case within the federal act, and facts bringing the case within the common-law liability, and facts bringing it within the state statute liability, not necessary to be alleged or proved to make a case under the federal act (and the facts alleged

**Arkansas.** *Lusk v. Osborn*, 127 Ark. 170, 191 S. W. 944; *Kansas City Southern R. Co. v. Miller*, 117 Ark. 396, 175 S. W. 1164; *St. Louis & S. F. R. Co. v. Conarty*, 106 Ark. 421, 155 S. W. 93; *Kansas City Southern R. Co. v. Cook*, 100 Ark. 467, 140 S. W. 579.

**Georgia.** *Southern R. Co. v. Puckett*, 16 Ga. App. 551, 85 S. E. 809.

**Illinois.** *Walton v. Pryor*, 276 Ill. 563, 115 N. E. 2.

**Kentucky.** *Chesapeake & O. R. Co. v. Shaw*, 168 Ky. 537, 182 S. W. 653.

**Missouri.** *Moore v. St. Joseph & G. I. R. Co.*, 268 Mo. 31, 186 S. W. 1035; *Fish v. Chicago, R. I.*

*& P. R. Co.*, 263 Mo. 106, 8 N. C. C. A. 538, Ann. Cas. 1916B 147, 172 S. W. 340; *Pankey v. Atchison, T. & S. F. R. Co.*, 180 Mo. App. 185, 6 N. C. C. A. 74, 168 S. W. 274.

**Texas.** *Texas & P. Ry. Co., v. Rasmussen*, — Tex. Civ. App. —, 181 S. W. 212; *Missouri, K. & T. Ry. Co., of Texas v. Bunkley*, — Tex. Civ. App. —. 153 S. W. 937.

**Virginia.** *Chesapeake & O. R. Co. v. Carnahan*, 118 Va. 46, 86 S. E. 863.

8. *Ullrich v. New York, N. H. & H. R. Co.*, 193 Fed. 768.

9. *Rice v. Boston & M. R. R.*, 203 Fed. 590.

bringing it within the federal act not being necessary to the cause of action under the common law or state statute), in the state court, the plaintiff may succeed on either one of three theories; that is, he may abandon all pretense that the case is within the federal act and yet succeed. By artful pleading he defeats removal. This question of removal has been up in the following cases: *Van Brimmer v. Texas & P. R. Co.* (C. C.), 190 Fed. 394; *Symonds v. St. Louis & S. E. R. Co.* (C. C.), 192 Fed. 353; *Lee v. Toledo, St. L. & W. R. Co.* (D. C.), 193 Fed. 685; *Hulac v. Chicago & N. W. R. Co.* (D. C.), 194 Fed. 747; *McChesney v. Ill. Cent. R. Co.* (D. C.), 197 Fed. 85; *Ullrich v. New York, N. H. & H. R. Co.* (D. C.), 193 Fed. 768. The *Ullrich* case is nearest in point here, and assumes that three causes of action are pleaded, which under the New York Code seems not to be the case. See later. If, on the trial in the state court, the plaintiff shall abandon the theory that the case arose under the federal act, or shall fail to show a case within that act, and that court has power at once to send the case back to the federal court, the rights of the defendant to removal will be protected and preserved."

### § 657. Contrary Decisions by other Federal Courts.

The prohibition of removal from a state to a federal court, mentioned in Section 6 of the Federal Employers' Liability Act, is limited to cases which purport, by the plaintiff's petition, to arise under that act; but when, to a cause of action arising under the act, it has been held by other federal courts, there is joined one which does not purport to arise under the federal statute, the prohibition does not apply.<sup>10</sup> For example, an administrator brought a suit against a common carrier, alleging a cause of action under the Federal Act in one count and under the statutory laws of the state of Kansas in another count. Each count declared upon the same

10. *Flas v. Illinois Cent. R. Co.*, 229 Fed. 319; *Patterson v. Bucknall S. S. Line*, 203 Fed. 1021;

*Rice v. Boston & M. R. R.* 203 Fed. 580; *Lusk v. Osborn*, 127 Ark, 170, 191 S. W. 944.

physical injury which resulted in the death. The defendant was a citizen of another state. A petition for removal was sustained.<sup>11</sup> "If a cause of action arising under the Federal Act," said Judge Van Valkenburgh, "is coupled with one arising under a state statute or at common law, stated in the alternative in separate counts, the plaintiff preserving the right, under recognized rules of local procedure, to make his election and avail himself of neither at the close of the evidence, the right of removal is presented more baldly at the threshold of the case. There is present at the same time a case arising under the federal act, and therefore, standing alone, not removable, and one not arising under that act, and therefore, the citizenship being diverse, admittedly susceptible of being removed. Must the defendant await the action of the plaintiff at the close of the evidence before claiming the right, and, if so, is his relief then clear and complete? The Supreme Court has thus far refrained from settling such procedure, although it has intimated that the defendant should not necessarily be deprived of relief. It rests with the plaintiff to determine whether he shall state a cause of action solely under the Employers' Liability Act, and therefore incapable of being removed, or whether he may unite with it, in the alternative, a cause of action that may be removed. If he adopts the latter course, does he not subject himself to the exercise of all the rights which a defendant may legitimately claim? Beyond question both causes of action are cognizable in the federal court, whether originally brought there or removed by consent. The provision against removal is a privilege granted to the plaintiff, which he may waive. If a cause of action containing all the elements of removability be joined with a count stating a cause of action not originally cognizable in the federal court, nevertheless the defendant may remove the former cause of action, and this will carry the entire case with it. *Sharkey v. Port Blakely Mill Co.* (C. C.) 92 Fed. 425.

11. *Strother v. Union Pac. R. Co.*, 220 Fed. 731.

The defendant cannot be shorn of his right to remove the former action because of such a joinder, and inasmuch as the plaintiff should and has joined in one petition all causes of action arising out of the same transaction, the removal should not, and does not, have the effect of splitting such causes, retaining one in the federal court, and remitting the other to the state court. I do not think the prohibition against removal contained in the federal act is of greater force than the denial in the Judiciary Act of the right to bring a suit, otherwise cognizable in a federal court, in a specific jurisdiction. It is conceded that the latter inhibition may be waived, and so equally may the former. I am of opinion that this entire cause of action, as presented by the pleadings, is removable; but if the question be regarded as doubtful in the present condition of the decided cases, nevertheless under the rule prevailing in this circuit the jurisdiction should be retained. *Boatmen's Bank v. Fritzlen*, 135 Fed. 650, 68 C. C. A. 288."

**§ 658. When Petition Does not State Cause of Action Under Federal Act Although so Intended.**

An action by an employe against a railroad company, incorporated under the laws of another state, where the other jurisdictional facts appear, is removable to the proper United States district court when the petition fails to state a cause of action under the Federal Employers' Liability Act although the plaintiff may have intended to bring his suit under that act.<sup>12</sup> In the *Thomas* case, cited the plaintiff, a resident of Iowa, brought an action in the Iowa courts against an Illinois railroad company engaged in interstate commerce. The petition was in two counts, one stating a cause of action under the laws of the state and the other attempting to state a cause of action under the Federal Employers' Liability Act. It was alleged in the last count that the carrier was engaged in interstate com-

12. *Thomas v. Chicago & N. W. Ry. Co.*, 202 Fed. 766.

merce and that the deceased employe was employed by it in such commerce at the time of his death. There was, however, no allegation that the decedent left surviving him a widow, child, parent or next of kin for whose benefit a right of action survives under the Federal Employers' Liability Act. The court held that since the petition therefore did not state a cause of action under the federal act, and since the suit was against a non-resident and for a greater sum than \$3,000, the cause was removable to the federal court. Judge Reed, in overruling the motion to remand, said: "It may be that it was intended to allege in this count of the petition a cause of action arising under the Federal Employers' Liability Act. If so, essential facts are wholly wanting to show such a cause of action; the averment alone that 'the carrier and its employe were engaged in interstate commerce at the time of the injury to and death of the employe' being insufficient to show such a right. If it appeared upon the face of the petition that sufficient facts existed to show a right of action under the federal act, but were inaptly or defectively alleged, such defects could be cured by an amendment, and they might be overlooked. But, when essential facts are wholly wanting, effect must be given to the petition as it is written." A contrary conclusion seems to have been reached by the supreme court of Kansas.<sup>13</sup>

**§ 659. Judgment of Highest State Court in Action under Federal Act may be Reviewed by United States Supreme Court, When.** In an action brought under the Federal Employers' Liability Act in the state court where there is a final judgment in the highest court of the state in which a decision in the cause could be had,

13. Griffith v. Midland Valley R. Co., 100 Kan. 500, 166 Pac. 467.

Unless it is alleged in the petition that the carrier was engaged and the servant was employed in

interstate commerce, the cause is removable when there is a diversity of citizenship. Northern Trust Co. v. Grand Trunk W. Ry. Co., — Ill. —, 118 N. E. 986.

the Supreme Court of the United States has appellate jurisdiction on a writ of error issued by it to the court of last resort in the state where the validity of the statute is drawn in question and the decision is against its validity; or where the statute is declared valid by the state court but is claimed by one of the parties to the litigation to be contrary or repugnant to the Constitution of the United States; or where the decision of the state court is against any title, right, privilege or immunity specially set up or claimed by either party to the action under the Constitution of the United States or some act of Congress.<sup>14</sup> Such questions may be

14. *Baltimore & O. R. Co. v. Branson*, 242 U. S. 623, 61 L. Ed. 534, 37 Sup. Ct. 244 (mem. dec.); *Minneapolis & St. L. R. Co. v. Nash*, 242 U. S. 619, 61 L. Ed. 531, 37 Sup. Ct. 239 (mem. dec.); *Atlantic Coast Line R. Co. v. Mims*, 242 U. S. 532, 61 L. Ed. 476, 37 Sup. Ct. 188; *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353, 61 L. Ed. 358, 37 Sup. Ct. 170, 13 N. C. C. A. 1127; *Erie R. Co. v. Welsh*, 242 U. S. 303, 61 L. Ed. 319, 37 Sup. Ct. 116; *Baltimore & O. R. Co. v. Wilson*, 242 U. S. 295, 61 L. Ed. 312, 37 Sup. Ct. 123; *Great Northern R. Co. v. Capital Trust Co.*, 242 U. S. 144, 61 L. Ed. 208, 37 Sup. Ct. 41, L. R. A. 1917E 1050; *Atlantic City R. Co. v. Parker*, 242 U. S. 56, 61 L. Ed. 150, 37 Sup. Ct. 69; *Chesapeake & O. R. Co. v. Kelly*, 241 U. S. 485, 60 L. Ed. 1117, 36 Sup. Ct. 630, 13 N. C. C. A. 673, L. R. A. 1917F 367; *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476, 60 L. Ed. 1110, 36 Sup. Ct. 626; *Chicago & N. W. R. Co. v. Bower*, 241 U. S. 470, 60 L. Ed. 1107, 36 Sup. Ct. 624; *Chesapeake & O. R. Co. v. Proffitt*, 241 U. S. 462, 60 L. Ed. 1102, 36 Sup. Ct.

620; *Southern Ry. Co. v. Gray*, 241 U. S. 333, 60 L. Ed. 1030, 36 Sup. Ct. 558; *Seaboard Air Line Ry. Co. v. Renn*, 241 U. S. 290, 60 L. Ed. 1006, 36 Sup. Ct. 567; *Baugham v. New York P. & N. R. Co.*, 241 U. S. 237, 60 L. Ed. 977, 36 Sup. Ct. 592, 13 N. C. C. A. 138; *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U. S. 211, 60 L. Ed. 961, 36 Sup. Ct. 595, L. R. A. 1917A 86, Ann. Cas. 1916E 505; *Kansas City Southern R. Co. v. Jones*, 241 U. S. 181, 60 L. Ed. 943, 36 Sup. Ct. 513; *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. Ed. 941, 36 Sup. Ct. 517, 11 N. C. C. A. 992; *Seaboard Air Line Ry. Co. v. Kenney*, 240 U. S. 489, 60 L. Ed. 762, 36 Sup. Ct. 458; *Great Northern R. Co., v. Knapp*, 240 U. S. 464, 60 L. Ed. 745, 36 Sup. Ct. 399; *Chicago, R. I. & P. Ry. Co. v. Bond*, 240 U. S. 449, 60 L. Ed. 735, 36 Sup. Ct. 403, 11 N. C. C. A. 342; *Great Northern R. Co. v. Wiles*, 240 U. S. 444, 60 L. Ed. 732, 36 Sup. Ct. 406; *Pecos & N. T. R. Co. v. Rosenbloom*, 240 U. S. 439, 60 L. Ed. 730, 36 Sup. Ct. 390; *Illinois Cent. R. Co. v. Skaggs*, 240 U. S.

reexamined by the Supreme Court of the United States on writ of error and the writ has the same effect as if the judgment complained of had been rendered by a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of the state court and may, at its discretion, award execution or remand the same to the court from which it was removed by the writ.<sup>15</sup>

66; 60 L. Ed. 528, 36 Sup. Ct. 249; Kansas City Western R. Co. v. McAdow, 240 U. S. 51; 60 L. Ed. 520, 36 Sup. Ct. 252, 11 N. C. C. A. 857; Seaboard Air Line Ry. v. Horton, 239 U. S. 595, 60 L. Ed. 458, 36 Sup. Ct. 180; Kanawha & M. R. Co. v. Kerse, 239 U. S. 576, 60 L. Ed. 458, 36 Sup. Ct. 174; Shanks v. Delaware, L. & W. R. Co., 239 U. S. 556, 60 L. Ed. 436, 36 Sup. Ct. 188; Southern R. Co. v. Lloyd, 239 U. S. 496, 60 L. Ed. 402, 36 Sup. Ct. 210; Atlantic Coast Line R. Co. v. Burnette, 239 U. S. 199, 60 L. Ed. 226, 36 Sup. Ct. 75; Chicago, R. I. & P. R. Co. v. Devine, 239 U. S. 52, 60 L. Ed. 140, 36 Sup. Ct. 27; Pennsylvania Co. v. Donat, 239 U. S. 50, 60 L. Ed. 139, 36 Sup. Ct. 4; Louisville & N. R. Co. v. Rhoda, 238 U. S. 608, 59 L. Ed. 1487, 35 Sup. Ct. 662 (mem. dec.); Seaboard Air Line Ry. v. Thornton, 238 U. S. 606, 59 L. Ed. 1485, 35 Sup. Ct. 601 (mem. dec.); Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. 865, 9 N. C. C. A. 265, Ann. Cas. 1916B 252; Delaware, L. & W. R. Co. v. Yorkonis, 238 U. S. 439, 59 L. Ed. 1397, 35 Sup. Ct. 902; New York Cent. & H. River R. Co. v. Carr, 238 U. S. 260, 59 L. Ed. 1298, 35 Sup. Ct. 780, 96 N. C. C. A. 1; St. Louis & S. F. R. Co. v. Conarty, 238 U. S. 243, 59 L. Ed. 1290, 35

Sup. Ct. 785; Seaboard Air Line Ry. v. Tilghman, 237 U. S. 499, 59 L. Ed. 1069, 35 Sup. Ct. 653; Minneapolis, St. P. & S. S. M. R. Co. v. Popplar, 237 U. S. 369, 59 L. Ed. 1000, 35 Sup. Ct. 609.

15. Section 237 of the Judicial Code (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1156). This code merely re-enacted sec. 709, R. S. U. S., 4 Fed. Stat. Ann. p. 467; Seaboard Air Line Ry. v. Duvall, 225 U. S. 477, 56 L. Ed. 1171, 32 Sup. Ct. 790; Kansas City Southern R. Co. v. C. H. Albers Com. Co., 223 U. S. 573, 56 L. Ed. 556, 32 Sup. Ct. 316; Gaar, Scott & Co. v. Shannon, 223 U. S. 468, 56 L. Ed. 510, 32 Sup. Ct. 236; Illinois Cent. R. Co. v. Com., 218 U. S. 551, 54 L. Ed. 1147, 31 Sup. Ct. 95; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. Ed. 921, 30 Sup. Ct. 676, 47 L. R. A. (N. S.) 84; Cincinnati, N. O. & T. P. R. Co. v. Slade, 216 U. S. 78, 54 L. Ed. 390, 30 Sup. Ct. 230; El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 Sup. Ct. 21; Chesapeake & O. R. Co. v. McDonald, 214 U. S. 191, 53 L. Ed. 963, 29 Sup. Ct. 546; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. Ed. 1061, 28 Sup. Ct. 616; Chambers v. Baltimore & O. R. Co., 207 U. S. 142, 52 L. Ed. 143, 28 Sup. Ct.

§ 660. **Remedy by Writ of Error Excluded in Certain Cases by Amendatory Act of 1916.** The decisions cited in the foregoing paragraph construing section 237 of the Judicial Code providing for review by writ of error by the federal Supreme Court were rendered prior to the amendment of September 6, 1916,<sup>18</sup> which eliminates the remedy of writ of error therefore existing in certain cases and substitutes therefor writ of certiorari to be granted or refused in the exercise of a sound discretion by the court. This amendatory act is as follows: "That a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such state court, and may, in its discretion, award execution or remand the same to the court from which it was removed by the writ. It shall be competent for the Supreme Court, by certiorari or otherwise, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any clause wherein a final judgment or decree has been rendered or passed by the highest of a state in which a decision could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the

34; *Tilt v. Kelsey*, 207 U. S. 43, 52  
L. Ed. 95, 28 Sup. Ct. 1.

16. 39 Stat. at L. 726.



decision is in favor of their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority.” In construing this amendatory statute, Mr. Justice Van Devanter, for the court, said:” “Under sec. 237 of the Judicial Code, as amended September 6, 1916 (chap. 448, 1214), a final judgment or decree of a state court of last resort in a suit ‘where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity,’ may be reviewed in this court upon writ of error; but, if the suit be one ‘where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is in favor of their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege,

17. Philadelphia & R. Coal & Iron Co. v. Gilbert, 245 U. S. 162, 62 L. Ed. —, 38 Sup. Ct. 58.

or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority,' the judgment or decree can be reviewed in this court only upon a writ of certiorari. The difference between the two modes of securing a review, as contemplated by the statute, lies in the fact that a writ of error is granted as of right, while a writ of certiorari is granted or refused, in the exercise of a sound discretion. By a timely motion the defendant sought to have the service of the summons set aside upon the ground 'that said service is void, in that the defendant's consent to be sued in the state of New York by service upon its aforesaid designated agent can only be implied with respect to causes of action arising in connection with business the defendant transacts in the state of New York; the plaintiff's cause of action herein did not arise in connection with the business defendant transacts in the state of New York, but is brought to recover damages for personal injuries alleged to have been sustained in the state of Pennsylvania. An attempt to compel the defendant to respond to this suit in the supreme court of the state of New York, sitting in Westchester county, is an invasion of the defendant's rights under the Constitution of the United States, particularly sec. 1 of the 14th Amendment of the said Constitution.' All that was drawn in question by the motion was the validity of the service and the power of the court, consistently with the 1st section of the 14th Amendment,—probably meaning the due process of law clause—to proceed upon that service to a hearing and determination of the case. It did not question the validity of any treaty or statute of, or authority exercised under, the United States. Neither did it challenge the validity of a statute of, or an authority exercised under, any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States. Challenging the power of the court to proceed to a decision of the merits did not draw in question an authority exercised under the state, for, as this court has said, the power to hear and determine

cases is not the kind of authority to which the statute refers. *Betchell v. Demaret*, 10 Wal. 537, 540, 19 L. ed. 1007, 1008; *French v. Taylor*, 199 U. S. 274, 277, 50 L. Ed. 189, 191, 26 Sup. Rep. 76. It follows that the judgment cannot be reviewed upon writ of error. If a review was desired it should have been sought under that clause of the certiorari provision which reads, 'or where any title, right, privilege, or immunity is claimed under the Constitution,' "

**§ 661. Record must Show Right under Federal Laws was Specially Set up and Denied by State Court.** In order to sustain a writ of error from the Supreme Court of the United States to the highest court of a state in any action under the Federal Employers' Liability Act, it must appear, in order to give the United States Supreme Court jurisdiction, that a right under the Constitution or laws of the United States was specially set up by the plaintiff in error in the state trial court and denied by the highest court of the state.<sup>18</sup> "Where a party—drawing in question in this court a state enactment as invalid under the Constitution of the United States, or asserting that the final judgment of the highest court of a state denied to him a right or immunity under the Constitution of the United States—did not raise such question or especially set up or claim such right or immunity in the trial court, this court cannot review such final judgment and hold that the state enactment was unconstitutional, or that the right or immunity so claimed had been denied by the highest court of the state, if that court did nothing more than decline to pass upon the Federal question because not raised in the trial court, as required by the state practice."<sup>19</sup> It must also appear from the record that there was necessarily present

18. *Erie R. Co. v. Purdy*, 185 U. S. 148, 46 L. Ed. 847, 22 Sup. Ct. 605; *Morrison v. Watson*, 154 U. S. 111, 38 L. Ed. 927, 14 Sup. Ct. 995; *Miller v. State*, 153 U. S. 535, 38 L. Ed. 812, 14 Sup. Ct.

874; *Spies v. State*, 123 U. S. 131, 31 L. Ed. 80, 8 Sup. Ct. 21, 22.

19. *Missouri Pac. R. Co. v. Taber*, 244 U. S. 200, 61 L. Ed. 1082, 37 Sup. Ct. 522.

ed in the state court, a definite issue as to the correct construction of the Federal Employers' Liability Act so directly involved that the state court could not have given the judgment it did without deciding the question against the contention of the plaintiff in error.<sup>20</sup>

**§ 662. Contention That There is or is not Sufficient Evidence to Show Liability, Will Support Writ of Error.**

If at the close of the evidence in an action under the Federal Employers' Liability Act, defendant demurs or moves for directed verdict (the particular form of such motion being governed by the local practice) the action of the court thereon, if duly excepted to, raises a federal question which will support a writ of error from the national Supreme Court to the highest state court to which the case may be appealed.<sup>21</sup> If the demurrer is sustained the plaintiff may appeal and raise the federal question whether he has produced evidence tending to show existence of the federal right. If the demurrer is overruled, the defendant may appeal and

20. *Seaboard Air Line Ry. v. Duvall*, 225 U. S. 477, 56 L. Ed. 1171, 32 Sup. Ct. 790; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. Ed. 1061, 28 Sup. Ct. 616; *Moliter v. Wabash R. Co.*, 180 Mo. App. 84, 168 S. W. 250.

21. *Southern R. Co. v. Gray*, 241 U. S. 333, 60 L. Ed. 1030, 36 Sup. Ct. 588; *Great Northern R. Co. v. Knapp*, 240 U. S. 464, 60 L. Ed. 745, 36 Sup. Ct. 399; *Pecos & N. T. R. Co. v. Rosenbloom*, 240 U. S. 439, 60 L. Ed. 730, 36 Sup. Ct. 390; *Kanawha & M. R. Co. v. Kerse*, 239 U. S. 576, 60 L. Ed. 448, 36 Sup. Ct. 174; *Chicago, R. I. & P. R. Co. v. Wright*, 239 U. S. 548, 60 L. Ed. 431, 36 Sup. Ct. 185; *Seaboard Air Line Ry. v. Koennecke*, 239 U. S. 352, 60 L. Ed. 324, 36 Sup. Ct. 126, 11 N. C. C. A. 165; *Chicago, R. I. & P. R. Co. v. Devine*, 239 U. S. 52, 60 L. Ed. 140, 36 Sup. Ct. 27; *Pennsylvania Co. v. Donat*, 239 U. S. 50, 60 L. Ed. 139, 36 Sup. Ct. 4; *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. 865, 9 N. C. C. A. 265, Ann. Cas. 1916B 252; *Minneapolis, St. P. & S. S. M. R. Co. v. Popplar*, 237 U. S. 369, 59 L. Ed. 1000, 35 Sup. Ct. 609; *Seaboard Air Line Ry. v. Padgett*, 236 U. S. 668, 59 L. Ed. 777, 35 Sup. Ct. 481; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C 159; *Southern Pac. Co. v. Schulyer*, 227 U. S. 601, 57 L. Ed. 662, 33 Sup. Ct. 277, 43 L. R. A. (N. S.) 901; *Cresswill, v. Grand Lodge K. & P. of Georgia*, 225 U. S. 246, 56 L. Ed. 1074, 32 Sup. Ct. 822.

raise the federal question whether there is any evidence tending to show that the defendant is liable within the terms of the statute. The question as to whether there is any evidence tending to prove every element necessary to recover under the act, is a federal question if properly raised. Thus, in one case, the plaintiff failed to prove that a violation of the national Hours of Service Act, on which recovery was based, was the proximate cause of employe's death and because of such failure of proof, the cause was reversed in the national Supreme Court after an affirmance in the highest state court.<sup>22</sup> In the McWhirter case, cited, the defendant raised the federal question by requesting the court to instruct the jury to find in its favor. The court refused to do so and the defendant excepted. In deciding that such a question would support a writ of error from the highest state court to which the case was appealable, to the United States Supreme Court, Mr. Justice White said: "While it is true, as we have said, that, coming from a state court, the power to review is controlled by Rev. Stat., Sec. 709, yet where, in a controversy of a purely federal character, the claim is made and denied that there was no evidence tending to show liability under the federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the federal law."<sup>23</sup>

**§ 663. Power to Review does not Extend to Questions Merely Incidental and Non-Federal in Character.** Under the act of Congress heretofore cited, giving the Supreme Court of the United States the power to review judgments of the highest court of a state to which a case is appealable, in an action under the Federal Employers' Liability Act, the power of the United States Supreme

22. St. Louis, I. M. & S. P. Co. v. McWhirter, 229 U. S., 265 57 L. Ed. 1179, 33 Sup. Ct. 858.

23. The court in reaching this conclusion cited the following cases: Creswill v. Grand Lodge

K. P. of Georgia, 225 U. S. 246, 56 L. Ed. 1074, 32 Sup. Ct. 822; Kansas City Southern R. Co. v. C. H. Albers Commission Co., 223 U. S. 573, 50 L. Ed. 556, 32 Sup. Ct. 316.

Court does not extend to questions merely incidental and not federal in their character, that is, which do not in their essence involve the existence of the right in the plaintiff to recover under the federal statute to which his recourse by the pleadings was confined or the right of the defendant to be shielded from responsibility under that statute because, when properly applied, no liability on his part would result.<sup>24</sup> But the existence of jurisdiction to review under the principles just stated depends not merely upon form but upon substance, and, generally, the power to review cannot arise from the mere assertion of a formal right when such asserted right or claim is so wanting in foundation and unsubstantial as to be devoid of all merit and frivolous.<sup>25</sup>

**§ 664. Ruling of State Court that Federal Question was Sufficiently Raised Binding upon United States Supreme Court.** To support a writ of error to the United States Supreme Court, the federal statute re-

24. *Louisville & N. R. Co. v. Stewart*, 241 U. S. 261, 60 L. Ed. 989, 36 Sup. Ct. 586; *Kansas City Southern R. Co. v. Jones*, 241 U. S. 181, 60 L. Ed. 943, 36 Sup. Ct. 513; *Kansas City Western R. Co. v. McAdow*, 240 U. S. 51, 60 L. Ed. 520, 36 Sup. Ct. 252, 11 N. C. C. A. 857; *Chicago & A. R. Co. v. Wagner*, 239 U. S. 452, 60 L. Ed. 379, 30 Sup. Ct. 135, 11 N. C. C. A. 1087; *Seaboard Air Line Ry. v. Koennecke*, 239 U. S. 352, 60 L. Ed. 234, 36 Sup. Ct. 126, 11 C. C. A. 165; *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. 865, 9 N. C. C. A. 265, Ann. Cas. 1916B 252; *Norfolk Southern R. Co. v. Ferebee*, 238 U. S. 269, 59 L. Ed. 1303, 35 Sup. Ct. 781; *Minneapolis, St. P. & S. S. M. R. Co. v. Popplar*, 237 U. S. 369, 59 L. Ed. 1000, 35 Sup. Ct. 609; *Seaboard Air Line Ry. v. Padgett*,

236 U. S. 668, 59 L. Ed. 777, 35 Sup. Ct. 481; *Yazoo & M. V. R. Co. v. Wright*, 235 U. S. 376, 59 L. Ed. 277, 35 Sup. Ct. 130; *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. Ed. 1226, 34 Sup. Ct. 729, 6 N. C. C. A. 224; *St. Louis, I. M. & S. R. Co., v. McWhirter*, 229 U. S. 265, 57 L. Ed. 1179, 33 Sup. Ct. 858; *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. Ed. 355, 33 Sup. Ct. 135, Ann. Cas. 1914B 134; *Seaboard Air Line Ry. Co. v. Duvall*, 225 U. S. 477, 56 L. Ed. 1171, 32 Sup. Ct. 790; *Chicago Junct. R. Co. v. King*, 222 U. S. 222, 56 L. Ed. 173, 32 Sup. Ct. 79; *St. Louis, I. M. & S. R. Co., v. Taylor*, 210 U. S. 281, 52 L. Ed. 1061, 28 Sup. Ct. 616.

25. *Seaboard Air Line Ry. v. Padgett*, 236 U. S. 668, 59 L. Ed. 777, 35 Sup. Ct. 481.

be "especially set up or claimed" by the party appealing. If the highest supreme court of a state holds that a federal question was sufficiently raised and decided it, the objection that the claim or right was not presented quires that the right, title, privilege or immunity shall with clearness enough to save it, is not open in the United States Supreme Court.<sup>26</sup> In the *Hesterly* case, cited, which was an action under the Federal Employers' Liability Act, the administrator of a deceased employe was seeking to recover damages for the pain and suffering of the deceased, the death having occurred prior to the 1910 amendment. The defendant requested the trial court for a ruling that the plaintiff could not recover such damages, which request was denied and defendant excepted. On appeal to the state supreme court, that court treated the request as intended to raise the question whether the federal act displaced the state law and whether such damages could be recovered under it. The ruling of the lower court was sustained. When the case reached the national Supreme Court on writ of error, the defendant in error made the objection that the claim or right under the laws of the United States was not raised with sufficient clearness to save the point; but the United States Supreme Court held that since the state supreme court had decided the question sufficiently raised and passed upon it, such objection was not open in the national Supreme Court.

**§ 665. Federal Questions to Support Writ of Error to United States Supreme Court, need not be Raised by the Pleadings.** The federal claim or right which will support a writ of error from the United States Supreme Court to the highest court of a state, need not always be raised by the plaintiff in error by the pleadings. Where

26. *Southern R. Co. v. Lloyd*, 239 U. S. 496, 60 L. Ed. 402, 36 Sup. Ct. 210; *St. Louis, I. M. & S. Ry. Co. v. Hesterly*, 228 U. S. 702, 57 L. Ed. 1031, 33 Sup. Ct. 703; *Eau Claire Nat. Bank v.*

*Jackman*, 204 U. S. 522, 51 L. Ed. 596, 27 Sup. Ct. 391; *San Jose Land & water Co. v. San Jose Ranch Co.*, 189 U. S. 177, 47 L. Ed 765, 23 Sup. Ct. 487.

an interstate railroad was sued in the state court under a state statute for the death of an employe by beneficiaries in their individual capacities, and the defendant, not by answer, but by appropriate special exceptions, asked that the plaintiff be required to state facts showing whether they were relying on the state or federal act, which request was refused, and again at the conclusion of the testimony, defendant requested the court to direct the verdict in its favor on the ground that the undisputed evidence disclosed that the case was one which the federal statute controlled and that, if liable, it was liable to the personal representatives and not to the plaintiffs, which request was denied, and the jury returned a verdict for the plaintiffs in which the damages were apportioned among the parents and widow conformable to state law, the national Supreme Court held that the federal question was interposed in due time, and that the state courts erred in overruling it, thus supporting a writ of error from the national Supreme Court to the state supreme court.<sup>27</sup> It will be noticed that the federal right was not set up in the answer nor did the petition present any issue for the construction of the act, but the court held that in view of the fact that the plaintiff's evidence showed conclusively that the deceased was engaged in interstate commerce, it was sufficiently raised by a demurrer, especially since the court overruled the motion to make the petition state the facts as to employment in either kind of commerce.

**§ 666. Foregoing Rule Subsequently Qualified, Limited and Explained.** But ordinarily a federal right or claim must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the rules of practice in the state courts.<sup>28</sup>

27. St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. Ed. 1129, 33 Sup. Ct. 651, Ann. Cas. 1914C 156; Toledo, St. L. & W. R. Co. v. Slavin, 236 U. S. 454, 59 L. Ed. 671, 35 Sup. Ct. 306; Moliter v. Wabash R. Co., 180 Mo. App. 84, 168 S. W. 250.

28. Mutual Life Ins. Co. v. McGrew, 188 U. S. 291, 47 L. Ed.



The Supreme Court, in a later case,<sup>29</sup> reviewed its rulings in the cases cited in the foregoing paragraph and held that while the Federal Act was not especially referred to in the pleadings in those cases, yet the pleadings therein were in such form that the trial court admitted testimony making it necessary to apply the Federal Act in deciding the cases. In the Mims case, cited, the plaintiff based his cause of action upon the laws of the state, and the defendant attempted to defeat a recovery by showing in its evidence that the plaintiff was engaged in interstate commerce without so alleging the facts to be in its answer filed in the cause. The trial court sustained an objection to the introduction of such proof because the facts showing interstate employments were not pleaded in the answer. By excluding such evidence under the circumstances, the defendant was not denied a federal right. "While it is true," said Mr. Justice Clark for the Court, "that a substantive Federal right or defense duly asserted cannot be lessened or destroyed by a state rule of practice, yet the claim of the plaintiff in error to a Federal right not having been asserted at a time and in a manner calling for the consideration of it by the state supreme court under its established system of practice and pleading, the refusal of the trial court and of the supreme court to admit the testimony tendered in support of such claim is not a denial of a Federal right which this court can review (*Baldwin v. Kansas*, 129 U. S. 52, 32 L. Ed. 640, 9 Sup. Ct. Rep. 193; *F. G. Oxley Stage Co. v. Butler County*, 166 U. S. 648, 41 L. Ed. 1149, 17 Sup. Ct. Rep. 709); and therefore, for want of jurisdiction, the writ of error is dismissed."

**§ 667. Pleading Federal Act and Submitting Case to Jury under State Law, no Denial of Federal Right.**

480, 23 Sup. Ct. 375, 63 L. R. A. 33; *Layton v. Missouri* 187 U. S. 356, 47 L. Ed. 214, 23 Sup. Ct. 127; *Erie R. Co. v. Purdy*, 185 U.

S. 148, 46 L. Ed. 847, 22 Sup. Ct. 605.

29. *Atlantic Coast Line R. Co. v. Mims*, 242 U. S. 532, 61 L. Ed. 476, 37 Sup. Ct. 188.

In an action under the federal act where a petition stated a good cause of action under that law and eliminating the allegations as to interstate employment, stated a good cause of action under the law of the state, and the defendant upon the conclusion of all the evidence requested the court to instruct the jury that the case could not be maintained under the federal act and the lower court sustained its contention and submitted the cause under the state law, no right under the federal law by the action of the state court was denied the defendant and hence a writ of error to the United States Supreme Court could not be maintained.<sup>30</sup>

**§ 668. When Petition not Stating a Good Cause of Action under Federal Act Raises a Federal Question.**

In an action by the administrator of a deceased railroad employe against a railroad company it was neither pleaded nor proven that the deceased left a widow, child, parent or dependent next of kin surviving him which is jurisdictional to a recovery under the federal act. Defendant in its answer set up that it was engaged in interstate commerce and that the deceased servant was employed by it in such commerce at the time of his death. The trial court overruled the contention of the defendant that the federal law applied and submitted the cause under the state law. The Supreme Court of the United States held that such a question was sufficient to support a writ of error for the reason that under the state law this limitation upon the recovery by an administrator was not recognized.<sup>31</sup>

**§ 669. Claim that Verdict is Excessive not Reviewable by Writ of Error.** A contention that a verdict in an action under the federal act is excessive does not present a question for reexamination upon a writ of error in the Supreme Court of the United States. Such

30. *Wabash R. Co. v. Hayes*,  
234 U. S. 86, 58 L. Ed. 1226, 34  
Sup. Ct. 729, 6 N. C. C. A. 224.

31. *North Carolina R. Co. v.*  
*Zachary*, 232 U. S. 248, 58 L. Ed.  
591, 34 Sup. Ct. 305, 9 N. C. C.  
A. 109, Ann. Cas. 1914C 159.

questions are matters to be dealt with by the state courts.<sup>32</sup>

**§ 670. Pleading and Practice in State Courts Under Employers' Liability Statute not Federal Questions.** Matters of pleading and practice in actions under the Federal Employers' Liability Act prosecuted in state courts are not federal questions which will support a writ of error from the national Supreme Court to the highest court of the state in which a decision in a cause can be had.<sup>33</sup> For example, where the petition in an action under the federal act failed to allege that the decedent was engaged in interstate commerce but the omission was supplied by such an allegation in the replication, the question whether the defect in the original declaration had been cured by the subsequent pleading, was a decision on a matter of state practice and pleading which was blinding on the national Supreme Court.<sup>34</sup> Similarly the decision of a state court permitting an amendment to a petition changing liability from the state to the federal act, it was held, raised no question under the laws of the United States and no federal right was therefore infringed.<sup>35</sup>

**§ 671. State Law Requiring Facts Showing Applicability of Federal Act to be Pleaded No Denial of Federal Right.** When a common carrier by railroad seeks to defeat a personal injury action of an employe

32. *Southern Ry.-Carolina Division v. Bennett*, 233 U. S. 80, 58 L. Ed. 860, 34 Sup. Ct. 566, 10 N. C. C. A. 853.

33. *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. 865, 9 N. C. C. A. 265, Ann. Cas. 1916B 252; *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. Ed. 1226, 34 Sup. Ct. 729, 6 N. C. C. A. 224; *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. Ed. 355, 33 Sup. Ct. 135, Ann. Cas. 1914B 134;

*Brinkmeier v. Missouri Pac. R. Co.*, 224 U. S. 268, 56 L. Ed. 758, 32 Sup. Ct. 412; *Chicago Junct. R. Co. v. King*, 222 U. S. 222, 56 L. Ed. 173, 32 Sup. Ct. 79.

34. *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. 865, 9 N. C. C. A. 265, Ann. Cas. 1916B 252.

35. *Kansas City Western R. Co. v. McAdow*, 240 U. S. 51, 60 L. Ed. 520, 36 Sup. Ct. 252, 11 N. C. C. A. 857.

based upon a state law, by showing facts which render the federal act exclusively applicable thereto, a state rule of practice and pleading which forbids the defendant from introducing such proof unless pleaded in the answer does not deprive the defendant of a federal right; for if the court should permit the introduction of such testimony without the defendant having pleaded the same in its answer, unnecessary delay and unfair surprise of the plaintiff would follow and often a just claim would be defeated by the statute of limitation.<sup>36</sup> In the Mims case, plaintiff based his action upon the state law and the defendant attempted to defeat a recovery by showing that the plaintiff was engaged in interstate commerce without so pleading the facts in its answer. Under the circumstances, the testimony was excluded by the trial court and the United States Supreme Court held that the defendant was not thereby deprived of any federal right. Said the Court: "The practice differs in the courts of the various states as to what testimony may be introduced under 'a specific denial,' such as was filed in this case, and the supreme court of South Carolina, while recognizing fully the ruling character of the Federal Employers' Liability Act when the facts making it applicable are properly pleaded, yet, upon full and obviously candid and competent consideration, decided, as we have seen, that, under the settled rules of pleading in that state, the evidence tendered was not admissible. The essential justice of this decision, which is the fundamental thing, commends it to our favor. The evidence admitted in the case shows that the train which the deceased was about to inspect when he was killed was a local freight train, with a run habitually, and on the morning of the accident complained of, wholly within the state of South Carolina. If the relation of the deceased to the traffic which this intrastate train carried was such as to give an interstate character to his service, that fact must have been known to the defendant

36. Atlantic Coast Line R. Co. v. Mims, 242 U. S. 532, 61 L. Ed. 476, 37 Sup. Ct. 188

from the day the accident occurred, and it could not possibly have been known to the plaintiff, and therefore surprise and delay certainly, and possibly defeat of plaintiff's claim under statutes of limitation, must have been the inevitable result of permitting the introduction of the proffered testimony late in the second trial, without the Federal right claimed from it having been 'specially set up and claimed' in the answer of the defendant."

**§ 672. Refusal of Trial Court to Take Case from Jury will not be Disturbed by National Supreme Court unless Palpably Erroneous.** When an action under the Federal Act, taken to the national Supreme Court by writ of error from a state appellate court, presents no question as to the interpretation of any of the provisions of the statute, or as to the definitions of legal principles in its application, but simply involves an examination of all the facts and admissible inferences to be drawn therefrom for the purpose of determining whether there was sufficient evidence for the cause to be submitted to the jury, the refusal of the state court to take the case from the jury by directing a verdict for court on writ of error unless the action of the state the defendant, will not be disturbed by the national court is clearly and palpably erroneous.<sup>37</sup>

37. *Louisville & N. R. Co. v. Stewart*, 241 U. S. 261, 60 L. Ed. 989, 36 Sup. Ct. 586; *Great Northern R. Co. v. Knapp*, 240 U. S. 464, 60 L. Ed. 745, 36 Sup. Ct. 399; *Seaboard Air Line Ry. v.*

*Koennecke*, 239 U. S. 352, 60 L. Ed. 324, 36 Sup. Ct. 126, 11 N. C. C. A. 265; *Seaboard Air Line Ry. v. Padgett*, 236 U. S. 668, 59 L. Ed. 777, 35 Sup. Ct. 481.

## CHAPTER XXXV.

### PARTIES, PLAINTIFFS AND DEFENDANTS, IN ACTIONS UNDER LIABILITY ACT.

- Sec. 673. Personal Representative Only can Bring Suit in Case of Death.
- Sec. 674. Widow Cannot Maintain Suit in Individual Capacity Although she May be Sole Beneficiary.
- Sec. 675. Want of Legal Capacity in Widow to Sue Cannot be Waived.
- Sec. 676. Ancillary Administrator may Sue Under the Federal Act.
- Sec. 677. Personal Representative Alone may Revive Suit Commenced by Employee in his Lifetime.
- Sec. 678. Existence of Other Property Not Necessary to Secure Appointment of Personal Representative.
- Sec. 679. Agents and Servants Whose Negligence Caused Injury, not Liable under the Federal Act.
- Sec. 680. Lessor of a Railroad may be Made Party Defendant.
- Sec. 681. Personal Representative Appointed in One State cannot Sue in Another State Without Consent.

**§ 673. Personal Representative Only can Bring Suit in Case of Death.** The federal statute provides in the first section that the carrier shall be liable in damages to any employee suffering injury under the condition named in the act, or, "in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee." The amendment of 1910 also provides that "any right of action given by this act to a person suffering injury, shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury." In cases of death, therefore, it has been repeatedly held by the courts that suit under the federal act can only be brought by the personal representative of the deceased, that is, the

(1170)

administrator or the executer, as the case may be.<sup>1</sup> In an action for the death of an employe engaged in interstate commerce by a widow under a state law, the trial court refused the following instruction: "If M. A. Rosenbloom, at the time of his death, was engaged in

1. **United States.** *Pecos & N. T. R. Co. v. Rosenbloom*, 240 U. S. 439, 60 L. Ed. 730, 36 Sup. Ct. 390; *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. Ed. 1129, 33 Sup. Ct. 651, 3 N. C. C. A. 800, Ann. Cas. 1914C 156; *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. Ed. 1031, 33 Sup. Ct. 703; *American R. Co. v. Didricksen*, 227 U. S. 145, 57 L. Ed. 456, 33 Sup. Ct. 224; *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. Ed. 355, 33 Sup. Ct. 135, Ann. Cas. 1914B 134; *American R. Co. of Porto Rico v. Birch*, 224 U. S. 547, 56 L. Ed. 879, 32 Sup. Ct. 603; *Anderson v. Louisville & N. R. Co.*, 127 C. C. A. 277, 210 Fed. 689; *Pithian v. St. Louis & S. F. Ry. Co.*, 188 Fed. 842; *Dewberry v. Southern Ry. Co.*, 175 Fed. 307.

**Arkansas.** *Threadway v. St. Louis, I. M. & S. R. Co.*, 127 Ark. 211, 191 S. W. 930.

**Colorado.** *Denver & R. G. R. Co. v. Wilson*, — Colo. —, 163 Pac. 857.

**Georgia.** *Hardy v. Atlantic & W. P. R. Co.*, — Ga. App. —, 93 S. E. 18.

**Kansas.** *Giersch v. Atchison, T. & S. F. R. Co.*, 98 Kan. 452, 158 Pac. 54.

**Kentucky.** *Pittsburgh, C. C. & St. L. R. Co. v. Collard's Adm'r*, 170 Ky. 239, 185 S. W. 1108.

**Louisiana.** *La Casse v. New*

*Orleans, T. & M. R. Co.*, 135 La. 129, 64 So. 1012.

**Missouri.** *Sells v. Atchison, T. & S. F. R. Co.*, 266 Mo. 155, 181 S. W. 106; *Hearst v. St. Louis, I. M. & S. R. Co.*, 188 Mo. App. 36, 173 S. W. 86; *Thompson v. Wabash R. Co.*, 262 Mo. 468, 171 S. W. 364; *Vaughan v. St. Louis & S. F. R. Co.*, 177 Mo. App. 155, 164 S. W. 144; *Rich v. St. Louis & S. F. R. Co.*, 166 Mo. App. 379, 148 S. W. 1011.

**North Dakota.** *Hein v. Great Northern R. R.*, 34 N. Dak. 440, 159 N. W. 14.

**Oklahoma.** *Missouri, K. & T. R. Co. v. Lenahan*, 39 Okla. 283, 135 Pac. 383.

**Tennessee.** *Nashville, C. & St. L. R. Co. v. Anderson*, 134 Tenn. 666, Ann. Cas. 1917D 902, 185 S. W. 677; *Cincinnati, N. O. & T. P. R. Co. v. Bonham*, 130 Tenn. 435, 171 S. W. 79.

**Texas.** *Gulf, C. & S. F. Ry. Co. v. Cooper*, — Tex. Civ. App. —, 191 S. W. 579; *St. Louis Southwestern R. Co. v. Smitha*, — Tex. Civ. App. —, 190 S. W. 237; *Ft. Worth Belt Ry. Co. v. Jones*, — Tex. Civ. App. —, 182 S. W. 1184; *St. Louis Southwestern R. Co. v. Brothers*, — Tex. Civ. App. —, 165 S. W. 488; *Eastern Ry. of New Mexico v. Ellis*, — Tex. Civ. App. —, 153 S. W. 701; *De Rivera v. Atchison, T. & S. F. Ry. Co.*, — Tex. Civ. App. —, 3 N. C. C. A. 788, 149 S. W. 223.

examining seals and making record of seals on cars being transported interstate over the line of defendant and other lines of connecting carriers, and if such work was a necessary part and customary work, reasonably carried on by defendant as a part of its business, transporting freight interstate over its line, or if he had then just completed such inspection of said train and had not yet completed his record and placed it in the place where usually kept, then you will return a verdict for the defendant on its special plea that plaintiff has no right to maintain this suit in the capacity in which she sues." The federal Supreme Court held that the instruction should have been given. "Upon a clearly erroneous assumption," said Mr. Justice McReynolds, "that there was nothing on which to base such request, the Supreme Court approved its refusal. The record discloses no proper reason for thus denying plaintiff in error a right claimed under the Federal Employers' Liability Act. If when struck deceased was employed in interstate commerce, the right of recovery depended upon that Act; and it only permits suit by a personal representative for the benefit of surviving widow or husband and children if there be such. April 22, 1908 (c. 149, 35 Stat. 65; April 5, 1910, c. 143, 36 Stat. 291). It is unnecessary to take up other points presented by counsel; the purpose and effect of the Federal legislation has been much discussed in our recent opinions."<sup>2</sup>

**§ 674. Widow Cannot Maintain Suit in Individual Capacity Although she May be Sole Beneficiary.** If at the time of the accident, the railroad company was engaged in interstate commerce and the servant was employed by it in such commerce, the remedy given by the federal act is exclusive and the widow cannot sustain a suit in her individual capacity, although she is the sole beneficiary and although the laws of the state where the accident occurred provide that the widow is

2. *Pecos & N. T. R. Co. v. Rosenbloom*, 240 U. S. 439, 60 L. Ed. 730, 36 Sup. Ct. 390.



the proper party to bring suit for the death of an employe.<sup>3</sup> Prior to the decisions of the Supreme Court of the United States, cited, a few courts had decided that a widow, under such circumstances, was not limited to sue under the Federal Employers' Liability Act, but was also entitled to sue under the state law.<sup>4</sup> These decisions are now in conflict with the controlling rulings of the national Supreme Court.

**§ 675. Want of Legal Capacity in Widow to Sue Cannot be Waived.** The want of legal capacity in a widow to sue as an individual under the federal statute, goes to the substance of the action and cannot be waived.<sup>5</sup> Where a widow, suing individually as plaintiff

3. **United States.** *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. Ed. 355, 33 Sup. Ct. 135, Ann. Cas. 1914B 143; *American R. Co. of Porto Rico v. Birch*, 224 U. S. 547, 56 L. Ed. 879, 32 Sup. Ct. 603; *American R. Co. of Porto Rico v. Coronas*, 144 C. C. A. 599, 230 Fed. 545; *Dewberry v. Southern Ry. Co.*, 175 Fed. 307.

**Arkansas.** *Threadway v. St. Louis, I. M. & S. R. Co.*, 127 Ark. 211, 191 S. W. 930.

**Colorado.** *Denver & R. G. R. Co. v. Wilson*, — Colo. —, 163 Pac. 857.

**Kansas.** *Giersch v. Atchison, T. & S. F. R. Co.*, 98 Kan. 452, 158 Pac. 54.

**Kentucky.** *Pittsburgh, C. & St. L. R. Co. v. Collard's Adm'r*, 170 Ky. 239, 185 S. W. 1108.

**Missouri.** *Sells v. Atchison, T. & S. F. Ry. Co.*, 266 Mo. 155, 181 S. W. 106; *Thompson v. Wabash R. Co.*, 262 Mo. 468, 171 S. W. 364; *Dungan v. St. Louis & S. F. R. Co.*, 178 Mo. App. 164, 165 S. W. 1116; *Vaughan v. St. Louis*

*& S. F. R. Co.*, 177 Mo. App. 155, 164 S. W. 144; *Rich v. St. Louis S. F. R. Co.*, 166 Mo. App. 379, 148 S. W. 1011.

**North Dakota.** *Hein v. Great Northern R. R.*, 34 N. Dak. 440, 159 N. W. 14.

**Tennessee.** *Nashville, C. & St. L. Ry. Co. v. Anderson*, 134 Tenn. 666, Ann. Cas. 1917D 902, 685 S. W. 677; *Cincinnati, N. O. & T. P. R. Co. v. Bonham*, 130 Tenn. 435, 171 S. W. 79.

**Texas.** *St. Louis Southwestern Ry. Co. v. Brothers*, — Tex. Civ. App. —, 165 S. W. 488; *Eastern Ry. Co. of New Mexico v. Ellis*, — Tex. Civ. App. —, 153 S. W. 701.

4. An illustrative case is *Troxell v. Delaware, L. & W. R. Co.*, 180 Fed. 871. This case was reversed when it reached the Circuit Court of Appeals, 105 C. C. A. 593, 183 Fed. 373.

5. *Pecos & N. T. R. Co. v. Rosenbloom*, 240 U. S. 439, 60 L. Ed. 730, 36 Sup. 390; *Giersch v. Atchison, T. & S. F. R. Co.*, 98 Kan. 452, 158 Pac. 54; *Missouri,*

in a Missouri court, and alleging a cause of action under the laws of the state of Kansas, obtained a judgment upon proof showing that her husband was killed while assisting in the movement of an interstate train, she could not thereafter, as administratrix, enter her appearance and adopt the judgment.<sup>6</sup> In the Vaughan case, cited in the notes, it was argued on behalf of the widow that the federal statute did not control procedure in the state courts and that as the defendant did not demur or raise the objection by answer, it waived the lack of capacity in plaintiff to sue. But Judge Trimble, speaking for the court, in answering this contention, said: "The trouble with this contention is that since the Federal Act displaces the Kansas statute it has taken out of the widow the right to recover and placed it in the personal representative, and when defendant by its demurrer to the evidence objected to any judgment, there was *no law in force* authorizing the court to render judgment in her favor. The court had no authority, *outside of the Federal law*, to render any judgment. Hence it had no authority to render the judgment it gave, and, as defendant objected thereto, by demurring to the evidence, the validity thereof was not waived. (See on this point *Barker v. Railroad*, 91 Mo. 86; *Hegberg v. Railroad*, 164 Mo. App. 565; *Poor v. Watson*, 92 Mo. App. 89.) Again, while the Federal Act does not attempt to control State procedure, yet it does not leave State procedure so free and untrammelled as to allow such procedure to *work a change in the terms of the statute*. So that as defendant objected to the judgment before it was rendered the provisions of the Federal law were not waived." Other courts have held that if the pleading contains a statement of facts showing that the remedy given by the federal act applies, or the evidence discloses that the decedent was killed while employed in interstate

K. & T. R. Co. v. Lenahan, 39 Okla. 283, 135 Pac. 383.

6. Dungan v. St. Louis & S. F. R. Co., 178 Mo. App. 164, S.

W. 1116; Vaughan v. St. Louis & S. F. R. Co., 177 Mo. App. 155, 164 S. W. 144.

commerce, the want of the widow's legal capacity to sue may be raised for the first time in the appellate court.<sup>7</sup>

**§ 676. Ancillary Administrator may Sue Under the Federal Act.** A deceased brakeman at the time of his death was in the employe of a railroad company running between a point in Tennessee and another point in Kentucky. He lived in Kentucky, and the railroad company was a corporation of Kentucky. He was killed in Tennessee. His widow was appointed administratrix of his estate by the proper court of the county in which he lived in Kentucky. Afterwards, upon proof that he had some property, an administrator was appointed in the county in Tennessee in which he was killed. Anderson, the Tennessee administrator, brought suit under the federal act against the railroad company in the state courts of Tennessee which, prior to the 1910 amendment as to removal, was removed to the District Court of the United States including that county. The pleading of the defendant set out these facts and the lower federal court dismissed the suit on the ground that the cause of action vested solely in the administratrix appointed in Kentucky. In the Circuit Court of Appeals the sole question before the court was whether, notwithstanding the previous appointment of the Kentucky administratrix, the Tennessee administrator could, for the purpose of the suit, be rightfully treated as the decedent's "personal representative" within the meaning of the Federal Employers' Liability Act. The court held that the federal statute did not vest the right of action solely in the administrator appointed in the state of the deceased employe's domicile, but that the action might be maintained by an ancillary administrator appointed in another state in view of the

7. St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, 57 L. Ed. 1031, 33 Sup. Ct. 703; Penny v. New Orleans Great Northern R. Co., 135 La. 962, 66

So. 313; La Casse v. New Orleans, T. & M. R. Co., 135 La. 129, 64 So. 1012; Cincinnati, N. O. & T. P. R. Co. v. Bonham, 130 Tenn. 435, 171 S. W. 79.

remedial character of the statute and the representative character of the suit authorized, especially where the ancillary administrator is appointed in the state where the death occurred, and the suit is brought and prosecuted with the approval of the domiciliary administratrix who is also the principal beneficiary.<sup>8</sup>

**§ 677. Personal Representative Alone may Revive Suit Commenced by Employee in his Lifetime.** Prior to the amendment of 1910, it had been held by the courts that the cause of action given an employe by the federal statute did not survive his death, but was extinguished by his death.<sup>9</sup> These decisions led Congress to pass the amendment providing for the survival of the cause of action. Notwithstanding, the amendment provides that the damages shall go to the same beneficiaries mentioned in the first section of the act, the personal representative is the only proper party plaintiff to revive and prosecute the suit in the event of the death of the employe after bringing a suit for his own injuries.<sup>10</sup>

**§ 678. Existence of Other Property not Necessary to Secure Appointment of Personal Representative.** Although an employe of a common carrier by railroad, killed under circumstances rendering the federal act exclusively applicable, left no other property except the right of action for the beneficiaries under the national statute, letters of administration on his estate may nevertheless be issued.<sup>11</sup>

8. *Anderson v. Louisville & N. R. Co.*, 127 C. C. A. 277; 210 Fed. 689.

9. *Walsh v. New York, N. H. & H. R. Co.*, 173 Fed. 494; *Fulgham v. Midland Valley R. Co.*, 167 Fed. 660.

10. *St. Louis Southwestern Ry. Co. of Texas v. Smitha*, — Tex. Civ. App. —, 190 S. W. 237; *St. Louis Southwestern Ry. Co. v. Brothers*, — Tex. Civ. App. —, 165 S. W. 488.

11. *Southern Pac. Co. v. Da Valle Da Costa*, 111 C. C. A. 417, 190 Fed. 689; *Howard v. Nashville & St. L. R. Co.*, 133 Tenn. 19, 179 S. W. 380; *St. Louis Southwestern R. Co. v. Smitha*, — Tex. Civ. App. —, 190 S. W. 237; *Eastern Ry. Co. of New Mexico v. Ellis*, — Tex. Civ. App. —, 153 S. W. 701; *Gulf, C. & S. F. Ry. Co. v. Beezley*, — Tex. Civ. App. —, 153 S. W. 651; *De Rivera v. Atchison, T. &*

**§ 679. Agents and Servants Whose Negligence Caused Injury, not Liable under the Federal Act.**

The agents or servants whose negligence cause an injury to another employe employed by the carrier at the time of the injury, in interstate commerce, are not liable under the federal statute. In one case the administrator of a deceased employe's estate brought suit against a railroad company and alleged facts which showed that the federal act was applicable. A master mechanic, whose negligence was claimed to have caused the injury, was joined as defendant. The court held that the master mechanic was not liable under the Federal Employers' Liability Act, for the law is limited to common carriers engaged in interstate commerce and the master mechanic was not a common carrier engaged in interstate commerce. It was held, however, that if his negligence caused the injury, he would be liable under the state statute to the proper party suing under that law.<sup>12</sup>

**§ 680. Lessor of a Railroad may be Made Party Defendant.**

When a railroad company leases its line to another company and the laws of the state provide that the lessor shall be liable for the acts of the lessee, the lessor may be sued for an injury occurring in that state under conditions described in the federal act although the injured servant was in the employe of the lessee.<sup>13</sup> But the Supreme Court of Illinois held that the owner of the track was not liable under the federal act to an employe of a licensee on the same track, the licensee

S. F. Ry. Co., — Tex. Civ App.  
—, 149 S. W. 223.

Where an employe of a common carrier by railroad suffered an injury in Arkansas, instituted a suit in Texas and died in California while the same was pending, the suit was properly revived in the name of the administrator in the Texas court although he

had no other property in that state. St. Louis Southwestern R. Co. v. Smitha, *supra*.

12. Kelly's Adm'x v. Chesapeake & O. Ry. Co., 201 Fed. 602.

13. North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C 159.

and its employe being at the time engaged in interstate commerce.<sup>14</sup>

**§ 681. Personal Representative Appointed in One State Cannot Sue in Another State Without Consent.** The personal representative of a deceased railroad employe killed while working for a railroad company in interstate commerce and while the company was so engaged, cannot prosecute an action for his death in any state besides the one in which he was appointed, unless he is authorized to do so by a statute of the state where he proposes to bring the action.<sup>15</sup>

14. *Wagner v. Chicago & A. R. Co.*, 265 Ill. 245, 106 N. E. 809.

15. *Baltimore & O. R. Co. v. Evans*, 110 C. C. A. 156, 188 Fed. 6; *Midland Val. R. Co. v. Le-*

*moyne*, 104 Ark. 327 148 S. W. 654; *Hall v. Southern R. Co.*, 146 N. C. 345, 59 S. E. 879; *St. Louis Southwestern R. Co. v. Smith*, —Tex. Civ. App. —, 190 S. W. 237.

## CHAPTER XXXVI.

### PLEADINGS UNDER THE LIABILITY ACT.

- Sec. 682. Plaintiff's Petition Must Plead Facts Showing That Injury or Death Occurred under Conditions Described in Federal Act.
- Sec. 683. If Petition States Cause of Action Solely under Federal Law, There can be no Recovery under State Law—Contrary Rulings.
- Sec. 684. Petition Stating a Cause of Action Under State Law, Recovery Permitted under Federal Act When Omitted Allegations are Supplied by the Answer.
- Sec. 685. Recovery under Petition Stating Cause of Action under State Law Though Evidence Shows a Case under Federal Act, Harmless Error on Appeal, When.
- Sec. 686. Pleading Cause of Action under State Law in One Count and under Federal Act in Another Count, Allowed.
- Sec. 687. Petition Need not Specifically Refer to the Act if Facts Showing Liability Thereunder are Pleased.
- Sec. 688. State Law as to Sufficiency of Pleading Governs.
- Sec. 689. Allegations as to Engagement in Interstate Commerce Held Sufficient.
- Sec. 690. Allegations to Show Cause of Action under the Federal Act Held not Sufficient.
- Sec. 691. In Cases of Death Petition Must Allege Survival of Beneficiaries Named in Statute.
- Sec. 692. Petition Must Allege Pecuniary Loss to Beneficiaries.
- Sec. 693. In Suits under State or Common Law, Applicability of Federal Act may be Raised by Answer.
- Sec. 694. Where Petition is Under State Law and Evidence Shows Case under Federal Statute, Plaintiff Cannot Recover.
- Sec. 695. Defendant in Suit under State Law Must Specifically Plead Facts under Federal Act to Defeat Recovery.
- Sec. 696. Amendment Setting up New Cause of Action after Two-Year Period of Limitation not Allowed.
- Sec. 697. Amendments Permissible after Two-Year Period of Limitation.

**§ 682. Plaintiff's Petition Must Plead Facts Showing That Injury or Death Occurred Under Conditions Described in Federal Act.** In order to recover in an action based upon the Federal Employers' Liability Act, the plaintiff should allege facts showing that at the time

of the accident the defendant was engaged as a common carrier by railroad in interstate commerce and that the plaintiff (or the decedent) was employed by the defendant in such commerce at the same time.<sup>1</sup> If the

1. **United States.** Seaboard Air Line Ry. v. Renn, 241 U. S. 290, 60 L. Ed. 1006, 36 Sup. Ct. 567; Osborne v. Gray, 241 U. S. 16, 60 L. Ed. 865, 36 Sup. Ct. 486; Kanawah & M. R. Co. v. Kerse, 239 U. S. 576, 60 L. Ed. 448, 36 Sup. Ct. 174; Seaboard Air Line R. Co. v. Koennecke, 239 U. S. 352, 60 L. Ed. 324, 36 Sup. Ct. 126, 11 N. C. C. A. 165; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C 159; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. Ed. 1129, 33 Sup. Ct. 651; Ann. Cas. 1914C 156; Walker v. Iowa Cent. Ry. Co., 241 Fed. 395; Lucchetti v. Philadelphia & R. Ry. Co., 233 Fed. 137; Illinois Cent. R. Co. v. Rogers, 136 C. C. A. 530, 221 Fed. 52; Atlantic Coast Line R. Co. v. Reaves, 125 C. C. A. 599, 208 Fed. 141; Shade v. Northern Pac. Ry. Co., 206 Fed. 353; Stafford v. Norfolk & W. R. Co., 202 Fed. 605; Walton v. Southern Ry. Co., 179 Fed. 175; Clark v. Southern Pac. Co., 175 Fed. 122; Watson v. St. Louis, I. M. & S. Ry. Co., 169 Fed. 942.

**Alabama.** Southern R. Co. v. Peters, 194 Ala. 94, 69 So. 611; Atlantic Coast Line R. Co., Ex parte, 190 Ala. 132, 67 So. 256.

**Arkansas.** St. Louis, I. M. & S. R. Co. v. Coke, 118 Ark. 49, 175 S. W. 1177; Kansas City Southern R. Co. v. Cook, 100 Ark. 467, 140 S. W. 579; St. Louis I. M. & S. R. Co. v. Hesterly, 98 Ark. 240, 135 S. W. 874.

**Georgia.** Rush v. Southern Ry. Co., — Ga. App. —, 91 S. E. 898; Charleston & W. C. R. Co. v. Brown, 13 Ga. App. 744, 79 S. E. 932.

**Illinois.** Wagner v. Chicago, R. I. & P. R. Co., 277 Ill. 114, 115 N. E. 201.

**Indiana.** Chicago & E. R. Co. v. Feightner, — Ind. App. —, 114 N. E. 659; Cincinnati, H. & D. Ry. Co. v. Gross, — Ind. App. —, 111 N. E. 653; Chicago & E. R. Co. v. Mitchell, — Ind. App. —, 110 N. E. 78; Southern R. Co. v. Howerton, 182 Ind. 208, 106 N. E. 639.

**Kansas.** Cole v. Atchison, T. & S. F. R. Co., 97 Kan. 461, 155 Pac. 949.

**Kentucky.** Norfolk & W. R. Co. v. Short's Adm'r, 171 Ky. 647, 188 S. W. 786; Baltimore & O. R. Co. v. Smith, 169 Ky. 593, 184 S. W. 1108; Cincinnati, N. O. & T. P. R. Co. v. Tucker, 168 Ky. 144, 181 S. W. 940.

**Michigan.** Gaines v. Grand Trunk R. Co. of Canada, 193 Mich. 398, 159 N. W. 542; Jorgensen v. Grand Rapids & I. R. Co., 189 Mich. 537, 155 N. W. 535.

**Minnesota.** Lewis v. Denver & R. G. R. Co., 131 Minn. 122, 154 N. W. 945.

**Missouri.** Christy v. Wabash R. Co., 195 Mo. App. 232, 191 S. W. 241; Sells v. Atchison, T. & S. F. R. Co., 266 Mo. 155, 181 S. W. 106; Carpenter v. Kansas City Southern R. Co., 189 Mo. App. 164, 175 S. W. 234.



plaintiff's petition states a cause of action under the state law, no recovery can be had under the federal act, notwithstanding the evidence shows that the plaintiff's rights are governed by that statute.<sup>2</sup> One of the Missouri

**Montana.** *McBain v. Northern Pac. R. Co.*, 52 Mont. 575, 160 Pac. 654.

**New York.** *Rogers v. New York, Cent. & H. R. R. Co.*, — N. Y. App. Div. —, 157 N. Y. Supp. 83.

**North Carolina.** *Renn v. Seaboard Air Line R.*, 170 N. C. 128, 86 S. E. 964.

**Oklahoma.** *Chicago, R. I. & P. R. Co. v. McBee*, 45 Okla. 192, 145 Pac. 331; *St. Louis & S. F. R. Co. v. Brown*, 45 Okla. 143 144 Pac. 1075.

**Oregon.** *Kambris v. Oregon-Washington R. & Nav. Co.*, 75 Ore. 358, 146 Pac. 1097.

**Pennsylvania.** *Hogarty v. Philadelphia & R. R. Co.*, 245 Pa. 443, 91 Atl. 854.

**South Carolina.** *Camp v. Atlantic & C. Air Line R. Co.*, 100 S. C. 294, 84 S. E. 825.

**Tennessee.** *Nashville, C. & St. L. Ry. Co. v. Anderson*, Ann. Cas. 1917D 902, 134 Tenn. 666, 185 S. W. 677.

**Texas.** *Chicago, R. I. & G. Ry. Co. v. Cosio*, — Tex. Civ. App. —, 182 S. W. 83; *Bullock v. Crutcher*, — Tex. Civ. App. —, 180 S. W. 940; *Ft. Worth & D. C. Ry. Co. v. Stalcup*, — Tex. Civ. App. —, 167 S. W. 279; *Missouri, K. & T. R. Co. of Texas v. Neaves*, 60 Tex. Civ. App. 305, 127 S. W. 1090; *Missouri, K. & T. R. of Texas v. Hawley*, 58 Tex. Civ. App. 143, 123 S. W. 726.

**Washington.** *Smith v. Northern Pac. R. Co.*, 79 Wash. 448, 140 Pac. 685.

**West Virginia.** *Easter v. Virginian R. Co.*, 76 W. Va. 383, 11 N. C. C. A. 101, 86 S. E. 37.

Concerning the necessity of pleading facts showing that the suit is brought under the Federal Employer's Act, the supreme court of Alabama, in reversing the case of *Atlantic Coast Line R. Co. v. Jones*, 9 Ala. App. 499, 63 So. 693, said: "It is essential to the certain and orderly administration of the law of master and servant, as these distinct enactments establish it, that the initial pleading, or its amendment, be so drawn that the courts may be able to determine under which of the two enactments, state or federal, the respective counts are intended to assert a claim for liability. The sufficiency vel non of counts under our state statute necessarily involve questions that will not arise upon the issue of sufficiency vel non of counts seeking to declare upon a liability under the federal statute; and the provisions of the latter enactment forbid matters of defense admissible in an action under the state statute."

A complaint under the Federal Employers' Liability Act should allege ultimate and issuable facts and not evidentiary facts or conclusions of law as to interstate employment. *Lewis v. Denver & R. G. R. Co.*, *supra*.

2. *Midland Valley R. Co. v. Ennis*, 109 Ark. 206, 159 S. W. 214; *Penny v. New Orleans Great Northern R. Co.*, 135 La. 962, 66

courts of appeals decided that it was not necessary in a petition to recover under the federal act to allege that the railroad company was engaged in interstate commerce as the court will take judicial notice that all railroads in the state are engaged in interstate commerce,<sup>3</sup> but this decision lays down a rule that is contrary to the weight of authority.<sup>4</sup> A petition charging negligence under the original Safety Appliance Act was held to state no cause of action for the reason that there was no allegation in the petition that the cars having the defective couplers were at the time of the injury being used in interstate commerce.<sup>5</sup> A petition which does not state that the defendant was a common carrier, is defective.<sup>6</sup> On the other hand, an allegation that the defendant operated a steam railroad and was engaged in hauling and carrying freight and passengers on its line through several states was sufficient to show the carrier was engaged in interstate commerce but insufficient to show that the injured employe was also

So. 313; *Gaines v. Detroit*, G. H. & M. R. Co., 181 Mich. 376, 148 N. W. 397; *Moliter v. Wabash R. Co.*, 180 Mo. App. 84, 168 S. W. 250; *Rich v. St. Louis & S. F. R. Co.*, 166 Mo. App. 379, 148 S. W. 1011.

3. *McIntosh v. St. Louis & S. F. R. Co.*, 182 Mo. App. 288, 168 S. W. 821.

4. *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A. 109; *Ann. Cas.* 1914C 159; *Seaboard Air Line Ry. Co. v. Duvall*, 225 U. S. 477, 56 L. Ed. 1171, 32 Sup. Ct. 790; *Atlantic Coast Line R. Co. v. Reaves*, 125 C. C. A. 599, 208 Fed. 141; *Moliter v. Wabash R. Co.*, 180 Mo. App. 84, 168 S. W. 250; *Chicago, R. I. & P. R. Co. v. McBee*, 45 Okla. 192, 145 Pac. 331.

The supreme court of Michigan held that it was not necessary

for the plaintiff in any action for personal injuries against a common carrier by railroad to "plead either statute (state or federal), but that upon the coming in of the proofs, it was the duty of the trial court to permit an amendment of the pleadings to conform thereto." Under this decision the defendant is not entitled to notice by the pleadings, before the trial, as to which law, state or federal, the plaintiff is relying upon. *Fernette v. Pere Marquette R. Co.*, 175 Mich. 653, 141, N. W. 1084, 144 N. W. 834. *Contra*, *Gaines v. Detroit, G. H. & M. R. Co.*, 181 Mich. 181, 376; 148 N. W. 397.

5. *Brinkmeier v. Missouri Pac. R. Co.*, 224 U. S. 268, 56 L. Ed. 758, 32 Sup. Ct. 412.

6. *Shade v. Northern Pac. Ry. Co.*, 206 Fed. 353.

working in interstate commerce." "When a person seeks to maintain an action," said the court in the case last cited, "under a statute and to avail himself of its benefits, he is required by proper averments to bring himself within its provisions. . . . It is not sufficient, however, that it be averred merely that the carrier was so engaged. It must appear also that the employe was employed by the carrier in such commerce at the time when he received his injury. If facts were averred to the effect that appellant was engaged exclusively in interstate commerce, it would follow that appellee was so engaged while employed on one of its trains, assisting in its operation, but there is no such averment. A carrier may be engaged in interstate commerce, as a part of its business, and yet operate trains devoted exclusively to intrastate business. It will be observed that there is no allegation in the complaint that the train on which appellee was employed was an interstate train, or that any of its cars or freight was being carried from one state to another, and no allegations from which any of such facts may be deduced, or from which it may be gathered that appellee at the time when he received his injury was employed by appellant in interstate commerce. Under the averments of the complaint, appellee's duties and activities were circumscribed by the operation of the freight train. It follows that in the particular transaction, and respecting the occurrence under investigation, it does not appear from the complaint that appellant was engaged in interstate commerce, or that appellee was employed by it in interstate commerce."

**§ 683. If Petition States Cause of Action Solely Under Federal Law, There can be no Recovery Under State Law—Contrary Rulings.** In an action by an employe against a railroad company for injuries, if the petition states facts which constitute a cause of action

7. Cincinnati, H. & D. Ry. Co. v. Gross, — Ind. App. —, 111 N. E. 653.

*solely* under the federal act, and it develops at the close of the evidence, the plaintiff was not engaged in interstate commerce, the cause should not be submitted to the jury under the laws of the state, although after eliminating the allegations as to interstate employment, the petition states facts sufficient to constitute a cause of action under the state law.<sup>8</sup> This rule, however, does not apply when the petition states a cause of action under the state law in one count and under the federal law in another count.<sup>9</sup> The Kentucky Court of Appeals, however, held that even under a petition stating a cause of action solely under the federal act, the cause should be, under the conditions stated, submitted under the state law.<sup>10</sup> It is impossible to harmonize this ruling with the cases previously cited herein and also with the cases cited in the preceding paragraph, holding that under a petition stating a cause of action under the state law, a recovery cannot be had under the federal act; for whatever is the true rule, it ought to work both ways and there can be no difference in principle between cases holding that the petition must allege a cause of action under it, if a recovery is sought under the federal act and a case in which the plaintiff is seeking a recovery under the state law when his petition declares a cause of action under the federal act. In

8. **Arkansas.** *Midland Valley R. Co. v. Ennis*, 109 Ark. 206, 159 S. W. 214.

**Indiana.** *Cincinnati, H. & D. Ry. Co. v. Gross*, — Ind. App. —, 111 N. E. 653.

**Kentucky.** *Schaeffer v. Illinois Cent. R. Co.*, 172 Ky. 337, 189 S. W. 237; *Chesapeake & O. R. Co. v. Shaw*, 168 Ky. 537, 182 S. W. 653; *Cincinnati, N. O. & T. P. R. Co. v. Tucker*, 168 Ky. 144, 181 S. W. 940; *Illinois Cent. R. Co. v. Kelley*, 167 Ky. 745, 181 S. W. 375.

**Michigan.** *Gaines v. Detroit, G.*

*H. & M. R. Co.*, 181 Mich. 376, 148 N. W. 397.

**Minnesota.** *Creteau v. Chicago & N. W. R. Co.*, 113 Minn. 418, 129 N. W. 855.

**Missouri.** *Moliter v. Wabash R. Co.*, 180 Mo. App. 84, 168 S. W. 250.

**Montana.** *McBain v. Northern Pac. R. Co.*, 52 Mont. 578, 160 Pac. 654.

9. Sec. 686, *infra*; *Ullrich v. New York, N. H. & H. R. Co.*, 193 Fed. 768.

10. *Jones v. Chesapeake & O. Ry. Co.*, 149 Ky. 566, 149 S. H. 951.

deciding the Jones case, cited in the notes, the Kentucky Court of Appeals, upon the question under discussion, cited a case decided by a federal district court as approving such a practice;<sup>11</sup> but in that case, the question was not passed upon, the controversy being as to the removability of a cause under the federal act, which also stated a cause of action under the state law. To permit a plaintiff to allege a cause of action under the federal act and then after all the evidence is in, if it appears that he was not engaged in interstate commerce, to submit the case under the state law, might work an injustice upon the defendant; for there may be defenses to actions under state laws, which he might have set up in his answer, and which he would not, in an action under the federal act. In such a case, as the petition only stated a cause of action under the federal act, a defendant could scarcely be expected to anticipate that the plaintiff, at the close of the evidence, would switch from law to law so as to make it obligatory upon the defendant to set up defenses to a law not pleaded, or relied upon in the petition. The converse of this rule has properly been applied to the defendant in an action under the federal act, for it has been repeatedly decided that a defendant cannot defeat the plaintiff's right to recover under a state law, by claiming that he was engaged in interstate commerce at the time, unless such a defense is pleaded in the answer.<sup>12</sup> If such a defense is to be made, the plaintiff should have notice of it, so that he may take such action as may be necessary to protect his interest. On the other hand, if a plaintiff expects to recover under a state law, he should be required to plead it in his petition so that the defendant may not be taken by surprise. In passing upon the question under discussion, the language of the Supreme Court of Arkansas, in *Midland v. Ry. Co. v. Ennis*, cited *supra*, states the rule that should be applied in such cases, as

11. *Ullrich v. New York, N. H. & H. R. Co.*, 193 Fed. 768.

12. Section 695, *infra*. If the plaintiff's proof shows a cause of

action under the federal, then there is a variance. Section 694, *infra*.

follows: "It is insisted now that, appellee having sued under the Employers' Liability Act, he cannot recover in this action under the laws of the State of Oklahoma for an injury which occurred while the deceased was engaged in interstate commerce. Facts which give the right to recover under the state law, and those which give the right to recover under the federal statute, constitute separate and distinct causes of action, for the federal statute is exclusive where the incident is embraced within interstate commerce service and does not apply where it is in intrastate service. The two clauses of action may, however, be joined in the same complaint. Kirby's Digest, sec. 6079, subd. 6. There cannot, however, be a recovery upon a cause of action other than that stated in the pleadings and upon which the issue is joined. *Patrick v. Whitley*, 75 Ark. 465, 85 S. W. 1179, 5 Ann. Cas. 672; *St. Louis, S. F. & T. Ry Co. v. Seale*, 229 U. S. 156. 33 Sup. Ct. 651, 57 L. Ed. 1129."

**§ 684. Petition Stating a Cause of Action Under State Law, Recovery Permitted Under Federal Act When Omitted Allegations are Supplied by the Answer.** Even though a petition for damages by an employe against a railroad company is silent as to the allegations necessary to constitute a cause of action under the federal act, i. e., engagement of the one and employment of the other by it in interstate commerce at the time of the injury, yet courts have sustained on appeal a recovery upon such a petition without amendment, under the federal act, under the following circumstances: when the defendant's answer alleged it was engaged, and the injured servant was employed, in interstate commerce at the time of the injury and the plaintiff admitted such allegations in his reply, a recovery under the federal act was sustained on appeal because the allegations necessary to state a good cause of action under the federal act were supplied by the defendant's answer, and under the doctrine of *aider*, the defect in the petition

was cured by the answer.<sup>13</sup> The courts, in some of the cases cited, tacitly recognized the general rule that a recovery under the federal act would not be permitted under a petition stating a cause of action under the laws of the state and also specifically held that the rule of express aider in pleadings does not go to the extent of curing a petition which states no cause of action; but held such petitions, being silent as to the employment of one and the engagement of the other in interstate commerce, merely stated a defective cause of action under the federal act. To the extent of holding that a petition for damages under the laws of a state, states also a cause of action under the federal act although defective, the cases cited in this paragraph seem to conflict with the rulings by other courts cited elsewhere.<sup>14</sup> The plaintiff in the Vickery case, cited, had been placed in a predicament endangering his right to recover, by a former opinion of the same court, and his failure to keep alive his cause of action under the federal act was due to the court's own error in a former opinion in another

13. **Connecticut.** Vickery v. New London Northern R. Co., 87 Conn. 634, 89 Atl. 277.

**Georgia.** Savannah & N. W. Ry. Co. v. Roach, 19 Ga. App. 388, 91 S. E. 506.

**Tennessee.** Nashville, C. & St. L. Ry. Co. v. Anderson, 135 Tenn. 666, Ann. Cas. 1917D 902, 185 S. W. 677.

**Texas.** Chicago, R. I. & G. Ry. Co. v. Cosio, — Tex. Civ. App. —, 182 S. W. 83.

**Vermont.** Niles v. Central Vermont R. Co., 87 Vt. 356, 89 Atl. 629; White's Adm'x v. Central V. R. Co., 87 Vt. 330, 89 Atl. 618.

A verdict against a railroad company for the death of a car repairer engaged in interstate commerce, was sustained by the Supreme Court of Arkansas although the complaint did not ex-

pressly declare under the federal statute. The decedent was repairing a car in Arkansas consigned from Kansas City, Mo., to Tuckerman, Ark. The court said: "The plaintiff does not, in her complaint, expressly declare upon the federal statute known as the Federal Employers' Liability Act.' Nor does the complaint even contain an allegation that Sharp was engaged in work on a car used in interstate commerce; but that fact is set forth in the answer and the case was tried under the terms of that statute. The rights of the parties must therefore be determined by the terms of the federal statute." St. Louis, I. M. & S. R. Co. v. Sharp, 115 Ark. 308, 171 S. W. 95.

14. Sections 682 and 683, *supra*.

case subsequently reversed by the Supreme Court of the United States.<sup>15</sup> In the former opinion in the other case the court had declared the Employers' Liability Act of 1908 invalid as being in conflict with the Constitution of the United States. The plaintiff in the Vickery case, relying upon this opinion, brought his action against the railroad company under the state law. It was conceded that he was engaged in interstate commerce. After the two-year period of limitation under the federal act had expired, the United States Supreme Court in the Mondou case held that the federal act was valid.<sup>16</sup> The plaintiff then sought to amend his petition by alleging that the defendant was engaged and that he was employed in interstate commerce at the time of the injury. The trial court refused to permit an amendment on the ground that the cause of action under the federal act had expired. Afterwards the defendant filed an amended answer alleging the engagement of the company and the employment of the plaintiff in interstate commerce at the time of the injury. The plaintiff then filed a reply, admitting these allegations of the amended answer and concluded his reply with a prayer for recovery under the federal act. To this reply the defendant demurred because, among other things, it was a departure from the original petition. The trial court overruled the demurrer and the defendant, refusing to stand on the demurrer, proceeded to trial. On the issues thus framed by the pleadings a trial was had with the usual result—a verdict by the jury against the railroad company. In the appellate court the case therefore turned upon questions of pleading and the court held, (a) that the plaintiff's petition stated a cause of action defectively under the federal act as distinguished from a defective cause of action, (b) that the answer supplied the defective allegations of the petition, (c) that a petition which states no cause of action cannot be aided by allegations in an answer, (d) that a petition which

15. In re Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169, 1 N. C.

C. A. 875, 38 L. R. A. (N. S.) 44.

16. Section 415, *supra*.



states a cause of action defectively under the federal act may be aided by allegations in the answer although filed after the two-year period of limitation, and (e) that defendant's demurrer to the reply on the ground of departure was, under the rules of pleading in that state waived by going to trial. In the other case by the same court, *Niles v. Central V. Ry. Co.*, cited *supra*, it was held by the court that when a petition stated a cause of action under the state law and the plaintiff sought in his reply to allege facts showing liability under the federal act, such matter constituted a departure.

**§ 685. Recovery Under Petition Stating Cause of Action Under State Law Though Evidence Shows a Case Under Federal Act, Harmless Error on Appeal, When.** Notwithstanding that, in an action by an employe against a railroad company, the evidence disclosed that the carrier was engaged and the injured servant was employed in interstate commerce, but the petition was based upon the state law and a recovery was permitted by the trial court under the state law, yet such an error will not work a reversal on appeal, unless the defendant has been prejudiced thereby.<sup>17</sup> For example, where a case was tried under the laws of the state of Wisconsin and it appeared in evidence that the plaintiff was engaged in interstate commerce, the error of the trial court in refusing to submit the cause under the state law was held not to be prejudicial as it did not appear that there were any differences between the state and the federal statutes that made the railway company's position worse if tried on the hypothesis that the state law governed.<sup>18</sup> Similarly, it was held that,

17. *Chicago, R. I. & P. R. Co. v. Wright*, 239 U. S. 548, 60 L. Ed. 431, 36 Sup. Ct. 185; *Chicago & N. W. R. Co. v. Gray*, 237 U. S. 399, 59 L. Ed. 1018, 35 Sup. Ct. 620, 9 N. C. C. A. 452; *Grand Trunk Western Ry. Co. v. Thrift Trust Co.*, — Ind. —, 115 N. E. 685; *Southern R. Co. v. How-*

*erton*, 182 Ind. 208, 105 N. E. 1025, N. E. 369; *Fernette v. Pere Marquette R. Co.*, 175 Mich. 653, 144 N. W. 834, 141 N. W. 1084; *Koennecke v. Seaboard Air Line Ry. Co.*, 101 S. C. 86, 85 S. E. 374.

18. *Chicago & N. W. R. Co. v. Gray*, 237 U. S. 399, 59 L. Ed.

if the federal law was more favorable to the defendant than the state law, it would not be a reversible error for the appellate court to let a recovery under the state law stand even though the evidence discloses a case under the federal law, the error in such a case not being material and prejudicial.<sup>19</sup> In another case, where, under similar circumstances, defendant availed himself during the trial, of all the defenses that he would have had under the federal law, it was held that the trial court, in permitting a recovery under the state law, did not commit such an error as would require a reversal because it did not appear that the defendant had in any way been prejudiced.<sup>20</sup> Courts are not inclined to listen with patience to defenses as to which law is applicable when the claim is made or denied as the exigencies of the situation may be advantageous to the defendant that the plaintiff and the defendant were engaged in interstate commerce if it appears from all the facts in the case that such defenses are made purely for delay and where they do not affect the substantial rights of the parties.<sup>21</sup> In the Nelson case his original complaint stated a cause of action under both the federal and the state law. The defendant in answering admitted that the plaintiff was injured, but denied that either the plaintiff or the defendant was engaged in interstate commerce at the time of the accident and injury. A further

1018, 35 Sup. Ct. 620, 9 N. C. C. A. 452.

19. McIntosh v. St. Louis & S. F. R. Co., 182 Mo. App. 288, 168 S. W. 821.

20. Southern R. Co. v. Howerston, 182 Ind. 208, 105 N. E. 1025.

In an action by an employee against a common carrier by railroad for injuries, the petition stated a cause of action under the common law. Defendant pleaded in its answer that the plaintiff had accepted benefits from a relief fund, thus releasing the defendant. Plaintiff in his

reply pleaded the federal statute abolishing such defenses and proved facts showing federal statute applied. Defendant at the trial admitted plaintiff was employed in interstate commerce. It was held that the cause should have been submitted to the jury under the federal act as the defendant was not prejudiced thereby. *Hogarty v. Philadelphia & R. R. Co.*, 245 Pa. 443, 91 Atl. 854.

21. *Illinois Cent. R. Co. v. Nelson*, 128 C. C. A. 525, 212 Fed. 69.

defense of contributory negligence and assumption of risk was pleaded. After the jury was empanelled and sworn, the counsel for defendant admitted that the defendant was liable for the injury to plaintiff unless the latter assumed the risk of the injury or was guilty of contributory negligence. Thereupon, before any evidence was introduced, the plaintiff immediately moved to amend his petition by striking out the allegation that he and the defendant were engaged in interstate commerce so that the complaint stated a cause of action under the state law. Although the defendant had denied in its answer that either of the parties were engaged in interstate commerce, defendant's counsel objected to the amendment. Counsel for plaintiff then offered to admit that both parties were engaged in interstate commerce if counsel for defendant wished to allege that fact. The offer was not accepted and the court granted the plaintiff's motion to amend its petition, which, after the amendment, stated only a cause of action under the state law. After the plaintiff's amendment was made defendant's counsel amended his answer by alleging that the defendant was engaged in interstate commerce at the time of plaintiff's injury but did not allege that the plaintiff was also employed in such commerce at the same time. In the course of the trial evidence was introduced which tended to prove that each of the parties was engaged in interstate commerce. No substantial evidence was introduced in support of the defense of assumption of risk or contributory negligence. At the close of all the evidence the plaintiff moved to strike out the evidence that the parties were engaged in interstate commerce at the time of the accident, on the ground that the answer did not set up that defense. Counsel for defendant moved to amend the answer so as to plead that defense but his motion was denied and the motion of the plaintiff to strike out the evidence was granted. The federal circuit court of appeals, in considering this case on appeal, held that in view of the fact that the negligence was admitted and that no evidence of assumption of

risk or contributory negligence was introduced by defendant, the errors of the court did not prejudice the defendant. Speaking of these gymnastic gyrations of a litigant in a court of justice, Judge Sanborn, for the court, said: "No error is perceived in these rulings. The defendant was offered its choice of the defense of a cause of action for an admitted liability under the federal law or under the state law. When the plaintiff alleged that his cause of action arose under the federal law, the defendant denied that it arose under that law. When the plaintiff alleged by an amendment that his cause of action arose under the state law, counsel for the defendant now insists that he intended to amend his answer so as to plead that it arose under the federal law. The court held that his amended pleading was insufficient to present that issue, and that ruling was clearly right, for it was indispensable to a plea of that fact that the defendant should aver that the plaintiff and his employer were each engaged in interstate commerce at the time of the accident, and the defendant did not allege that the plaintiff was so engaged. There was no error in the granting of the motion to strike out the evidence to the effect that the parties were engaged in interstate commerce because there was no pleading to warrant its admission and it was no abuse of discretion for the court to refuse the defendant permission, at the close of the trial, to inject that issue into the case when the record conclusively proved that the only purpose of the attempt to introduce it was to postpone the plaintiff's recovery of damages caused by the admitted negligence of the defendant. Not only this, but if there had been error in these rulings it would not have been fatal to this trial, because defendant's liability for its negligence was admitted, there was no substantial evidence of the plaintiff's assumption of the risk of his injury, or of his contributory negligence, the same person, the plaintiff, was entitled to recover whether his cause of action arose under the federal law or under the state law, the only question remaining at issue was the amount of the re-

coverable damages, and the rules for the measurement of these damages were identical under the federal law and under the state law, so that it appeared beyond doubt from the pleadings and the evidence that an error in these rulings did not prejudice and could not have prejudiced the defendant, and error without prejudice is no ground for reversal. Where, in an action against a common carrier for a negligent injury, the same party, if any one, is entitled to recover on the alleged cause of action, and the rules of law governing the trial of the issues in the case are the same under the federal employers' liability act and under the state laws, and no question of jurisdiction is involved, it is immaterial whether the action, trial, and judgment are had under the federal law or under the state law. Because there was no substantial evidence to sustain a verdict that the plaintiff assumed the risk of his injury or that he was guilty of contributory negligence, this record satisfies beyond doubt that the alleged errors in the rulings of the court on these subjects, as well as on matters relating to the question whether the cause of action arose under the federal law or under the state law, did not prejudice and could not have prejudiced the defendant, and they are accordingly dismissed without further discussion, whether they were made upon or exclusion of evidence, in the charge of the court, or questions regarding the pleadings, upon the admission in its refusal of requested instructions."

**§ 686. Pleading Cause of Action Under State Law in One Count and Under Federal Act in Another Count, Allowed.** All of the courts have generally agreed on the proposition that the plaintiff, if he is the proper party under both laws, may set up facts in one count of the petition showing liability under the federal act, and may, in another count of the same petition, plead facts showing liability under the state law.<sup>22</sup> In other words,

22. **United States.** *Lucchetti v. Philadelphia & R. Ry. Co.*, 233 Fed. 137.

**Alabama.** *Ex parte Atlantic Coast Line R. Co.*, 190 Ala. 132, 67 So. 256; *Atlantic Coast Line*

the pleader may charge a violation of both laws in separate counts of the same petition. After so pleading liability under both laws, at what stage of the proceedings subsequently, he will be required to elect, if at all, depends upon the rules of procedure of the courts of the state where the suit is pending. As the federal law, when applicable, gives the exclusive remedy and as, in some states, the questions involved under the state and federal act are very different, some conflict has arisen as to when a motion to elect, should be sustained, and these cases will be hereinafter reviewed. On the other proposition, as to whether liability under the two laws may be pleaded in separate counts in the same petition, the Supreme Court of the United States approved the practice, although such questions necessarily depend upon the rules of pleading in the state where the action is pending.<sup>23</sup> In the Hayes case, the United States Supreme Court said: "The plaintiff asserted only one right to recover for the injury, and

R. Co. v. Jones, 9 Ala. App. 499, 63 So. 693.

**Colorado.** Denver & R. G. R. Co. v. Wilson, — Colo. —, 163 Pac. 857.

**Connecticut.** Hubert v. New York, N. H. & H. R. Co., 90 Conn. 261, 96 Atl. 967.

**Georgia.** Savannah & N. W. Ry. Co. v. Roach, — Ga. App. —, 91 S. E. 506; Louisville & N. R. Co. v. Layton, — Ga. —, 90 S. E. 53.

**Kentucky.** Cincinnati, N. O. & T. P. R. Co. v. Clarke, 169 Ky. 662, 185 S. W. 94; Louisville & N. R. Co. v. Moore, 156 Ky. 708, 161 S. W. 1129.

**South Carolina.** Koennecke v. Seaboard Air Line Ry., 101 S. C. 86, 85 S. E. 374; Howell v. Atlantic Coast Line R. Co., 99 S. C. 417, 83 S. E. 639.

**Texas.** San Antonio & A. P. Ry. Co. v. Littleton, — Tex. Civ.

App. —, 180 S. W. 1194.

**Vermont.** Bouchard v. Central Vermont R. Co., 87 Vt. 399, L. R. A. 1915C 33, 89 Atl. 475.

**Virginia.** Norfolk & W. Ry. Co. v. Tucker's Adm'x, 120 Va. 540, 91 S. E. 614.

23. Wabash R. Co. v. Hayes, 234 U. S. 86, 58 L. Ed. 1226, 34 Sup. Ct. 729, 6 N. C. C. A. 224; Bankson v. Illinois Cent. R. Co., 196 Fed. 171; Midland Valley R. Co. v. Ennis, 109 Ark. 206, 159 S. W. 214; Atkinson v. Bullard, 14 Ga. App. 69, 80 S. E. 220.

A demurrer on the ground of misjoinder of courts where a cause of action under the federal law is stated in one count and under the state law in another, should be overruled. Bouchard v. Central Vermont R. Co., 87 Vt. 399, L. R. A. 1915C 33, 89 Atl. 475.

in the nature of things he could have but one. Whether it arose under the Federal act or under the state law, it was equally cognizable in the state court; and had it been presented in an alternative way in separate counts, one containing and another omitting the allegation that the injury occurred in interstate commerce, the propriety of proceeding to a judgment under the latter count, after it appeared that the first could not be sustained, doubtless would have been freely conceded. Certainly, nothing in the Federal act would have been in the way."

**§ 687. Petition Need not Specifically Refer to the Act if Facts Showing Liability Thereunder are Pleaded.**

If the petition of the plaintiff alleges facts which show that the defendant was a common carrier by railroad in interstate commerce at the time of the accident and that the plaintiff was employed by it in such commerce, the statute applies although no reference is made to it in the petition.<sup>24</sup> Since all state courts are required to

24. **United States.** *Kansas City W. R. Co. v. McAdow*, 240 U. S. 51, 60 L. Ed. 520, 36 Sup. Ct. 252, 11 N. C. A. 857; *Garrett v. Louisville & N. R. Co.*, 235 U. S. 308, 59 L. Ed. 242, 35 Sup. Ct. 32; *Grand Trunk Western Ry. Co. v. Lindsay*, 233 U. S. 42, 58 L. Ed. 838, 34 Sup. Ct. 58, Ann. Cas. 1914C 168; *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. Ed. 355, 33 Sup. Ct. 135, Ann. Cas. 1914B 284; *Ulrich v. New York, N. H. & H. R. Co.*, 193 Fed. 768; *Smith v. Detroit & T. S. L. R. Co.*, 175 Fed. 506.

**Arkansas.** *St. Louis, I. M. & S. R. Co. v. Hesterly*, 98 Ark. 240, 135 S. W. 874.

**Colorado.** *Denver & R. G. R. Co. v. Wilson*, — Colo. —, 163 Pac. 857.

**Georgia.** *Louisville & N. R. Co. v. Barrett*, 143 Ga. 742, 85 S. E. 923; *Gainesville Midland Ry. v.*

*Vandiver*, 141 Ga. 350, 80 S. E. 997; *Charleston & W. C. R. Co. v. Brown*, 13 Ga. App. 744, 79 S. E. 932; *Southern R. Co. v. Ansley*, 8 Ga. App. 325, 68 S. E. 1086.

**Illinois.** *Wagner v. Chicago, R. I. & P. R. Co.*, 277 Ill. 144, 115 N. E. 201.

**Iowa.** *Bradbury v. Chicago, R. I. & Pac. Ry. Co.*, 149 Iowa 51, 40 L. R. A. (N. S.) 684, 128 N. W. 1.

**Kentucky.** *Baltimore & O. R. Co. v. Smith*, 169 Ky. 593, 184 S. W. 1108; *Cincinnati, N. O. & T. P. R. Co. v. Tucker*, 168 Ky. 144, 181 S. W. 940.

**Michigan.** *Jorgenson v. Grand Rapids & I. R. Co.*, 189 Mich. 537, 155 N. W. 535.

**Minnesota.** *Ahrens v. Chicago, M. & St. P. R. Co.*, 121 Minn. 335, 141 N. W. 297; *McDonald v. Railway Transfer Co. of Minneapolis*, 121 Minn. 273, 141 N. W. 177;

take judicial notice of the federal law, it is not necessary to specifically plead that law if facts showing liability thereunder are stated in the petition.<sup>25</sup> The petition need not state in so many words that the action is brought under the federal statute. It is sufficient if the statement of facts in the petition bring the cause within the terms of the statute.<sup>26</sup>

**Denoyer v. Railway Transfer Co.,** of Minneapolis 121 Minn. 269, 141 N. W. 175.

**Missouri.** *Pipes v. Missouri Pac. R. Co.*, 267 Mo. 385, 184 S. W. 79; *Hartman v. Chicago, B. & Q. R. Co.*, 192 Mo. App. 271, 182 S. W. 148; *Carpenter v. Kansas City Southern R. Co.*, 189 Mo. App. 164, 175 S. W. 234; *McIntosh v. St. Louis & S. F. R. Co.*, 182 Mo. App. 288, 168 S. W. 821.

**North Dakota.** *Hein v. Great Northern R. R.*, 34 N. D. 440 159 N. W. 14.

**Oklahoma.** *Chicago, R. I. & P. Ry. Co. v. Hughes*, — Okla. —, 166 Pac. 411; *St. Louis & S. F. R. Co. v. Snowden*, 48 Okla. 115, 149 Pac. 1083.

**Pennsylvania.** *Hogarty v. Philadelphia & R. R. Co.*, 255 Pa. 236, 99 Atl. 741; *Hogarty v. Philadelphia & R. R. Co.*, 245 Pa. 443, 91 Atl. 854.

**South Carolina.** *Mims v. Atlantic Coast Line R. Co.*, 100 S. C. 375, 85 S. E. 372.

**Texas.** *Chicago, R. I. & G. Ry. Co. v. De Bord*, — Tex. —, 192 S. W. 767; *Chicago, R. I. & G. Ry. Co. v. Cosio*, — Tex. Civ. App. —, 182 S. W. 83; *San Antonio & A. P. Ry. Co. v. Littleton*, — Tex. Civ. App. —, 180 S. W. 1194.

**Vermont.** *Bouchard v. Central Vermont R. Co.*, 87 Vt. 399, L.

R. A. 1915C 33, 89 Atl. 475.

**Wisconsin.** *Calhoun v. Great Northern R. Co.*, 162 Wis. 264, 156 N. W. 198; *Rowlands v. Chicago & N. W. R. Co.*, 149 Wis. 51, Ann. Cas. 1916E 714, 135 N. W. 156.

25. **Florida.** *Seaboard Air Line Ry., v. Hess*, — Fla. —, 74 So. 500.

**Georgia.** *Southern R. Co. v. Ansley*, 8 Ga. App. 325, 68 S. E. 1086.

**Illinois.** *Wagner v. Chicago, R. I. & P. R. Co.*, 277 Ill. 114, 115 N. E. 201.

**Indiana.** *Pittsburgh, C. C. & St. L. R. Co. v. Farmers Trust & Savings Co.*, 183 Ind. 287, 108 N. E. 108; *Vandalia R. Co. v. Stringer*, 182 Ind. 676, 106 N. E. 865, 107 N. E. 673.

**Minnesota.** *McDonald v. Railway Transfer Co. of Minneapolis*, 121 Minn. 273, 141 N. W. 177.

26. **United States.** *Tralich v. Chicago, M. & St. P. Ry. Co.*, 217 Fed. 675; *Garrett v. Louisville & N. R. Co.*, 117 C. C. A. 109, 197 Fed. 715, 3 N. C. C. A. 769; *Ulrich v. New York, N. H. & H. R. Co.*, 193 Fed. 768; *Whittaker v. Illinois Cent. Ry. Co.*, 176 Fed. 130; *Clark v. Southern Pac. Co.*, 175 Fed. 122; *Cound v. Atchison, T. & S. F. Ry. Co.*, 173 Fed. 527.

**Alabama.** *Southern R. Co. v. Peters*, 194 Ala. 94, 69 So. 611;



**§ 688. State Law as to Sufficiency of Pleading Governs.** In an action under the federal act brought in the state courts, the rules of pleading and procedure of the state where the action is being prosecuted, governs throughout.<sup>27</sup> When a general allegation of negligence is sufficient under the rules applied by the state courts in ordinary actions, such an allegation is sufficient in an action under the federal act prosecuted in the state court.<sup>28</sup>

**§ 689. Allegations as to Engagement in Interstate Commerce Held Sufficient.** A petition in an action for personal injuries stating that the defendant was a common carrier by railroad and engaged in interstate commerce between the several states and that the plaintiff was employed as a brakeman on a freight train running from one state to another, contained sufficient allegations to show interstate employment within the terms of the federal act.<sup>29</sup> Where the injury was stated in the petition of plaintiff in an action under the federal act, to have been caused by the negligence of the railway company while it was engaged as a common carrier in carrying on interstate commerce and while the plaintiff was employed by it in such

Atlantic Coast Line R. Co. v. Jones, 12 Ala. App. 419, 67 So. 632.

Arkansas. St. Louis, I. M. & S. R. Co. v. Hesterly, 98 Ark. 240, 135 S. W. 874; Kansas City Southern R. Co. v. Cook, 100 Ark. 467, 140 S. W. 579.

Minnesota. Denoyer v. Railway Transfer Co. of Minneapolis, 141 Minn. 269, 141 N. W. 175.

Oklahoma. St. Louis & S. F. R. Co. v. Snowden, 48 Okla. 115, 149 Pac. 1083.

Texas. Chicago, R. I. & G. Ry. Co. v. Cosio, — Tex. Civ. App. App. —, 182 S. W. 83; San Antonio & A. P. Ry. Co. v. Little-

ton, — Tex. Civ. App. —, 180 S. W. 1194.

27. Kansas City Western R. Co. v. McAdow, 240 U. S. 51, 60 L. Ed. 520, 36 Sup. Ct. 252, 11 N. C. C. A. 857, Gibson v. Billingham & N. Ry. Co., 213 Fed. 488; Chesapeake & O. R. Co. v. Kelly's Adm'r, 161 Ky. 655, 171 S. W. 185; Winters v. Minneapolis & St. L. R. Co., 127 Minn. 532, 148 N. W. 1096.

28. Louisville & N. R. Co. v. Stewart's Adm'r, 156 Ky. 550, 161 S. W. 557.

29. Kansas City Southern R. Co., v. Cook, 100 Ark. 467, 140 S. W. 579.

commerce, the allegation was held sufficient.<sup>30</sup> A petition, in an action by an administrator under the federal act, alleging that the railroad on which decedent was killed ran from one state to another, that he was killed in making up a train to be moved to another state and that the defendant ran trains over the state line, contained a sufficient statement as to the applicability of the federal act in connection with other facts showing negligence and dependency.<sup>31</sup> A petition for personal injuries against a railroad company which alleged that the company was a corporation of the state, that the injured employe was working on a bridge which formed a part of the track and roadbed of the railroad company and that while so engaged he was injured, was held to have stated a cause of action under the federal act although the petition did not state that

30. *Grand Trunk Western Ry. Co. v. Lindsay*, 233 U. S. 42, 58 L. Ed. 838, 34 Sup. Ct. 581, Ann. Cas. 1914C 168.

A complaint in an action against a common carrier by railroad for injuries to a brakeman stated that the defendant was a railroad corporation engaged in interstate commerce and that the brakeman was injured by reason of the carelessness of the engineer in permitting the water to become low on the crown sheet of the locomotive and then suddenly injecting water into the boiler which caused a sudden and extreme amount of steam to be generated and caused the crown sheet to drop into the fire box producing a loud report and noise, which led the brakeman to believe he was in danger of great bodily harm, and, acting on that belief, jumped from the window of the cab and was injured. It was held that the complaint stated sufficient facts to show a cause of action

either under the state statute or under the federal statute. *Vandalia R. Co. v. Stringer*, 182 Ind. 676, 106 N. E. 865, 107 N. E. 673.

The court, in the case just cited, decided that the plaintiff, in an action for injuries, is only required to plead the facts and that a recovery may be then had according as the evidence may develop a case under the one liability or the other. While the complaint in this case may have been sufficient under the laws of the state, yet it was not sufficient to show a cause of action under the federal statute as there was no allegation or facts pleaded showing that the injured employe at the time of the injury was employed in interstate commerce although there was an allegation that the railroad company was so engaged.

31. *Hackett v. Chicago, I. & L. Ry. Co.*, 170 Ill. App. 140; *Ft. Worth & D. C. Ry. Co. v. Stalcup*, — Tex. Civ. App. —, 167 S. W. 279.

the company was engaged in interstate commerce.<sup>32</sup> A complaint alleging that the defendant, as a common carrier by railroad, owned a line of railroad from a point in one state to a point in another, and that the plaintiff, while working on a passenger train on said road, was injured in a head-on collision due to the negligence of the defendant, stated a cause of action under the federal act.<sup>33</sup> A complaint stating that the plaintiff, when he was injured, was employed as a fireman on a passenger train running from Chicago, Ill., to Milwaukee, Wis., was held sufficient to show that the company was engaged in interstate commerce and that the plaintiff was employed by it in such commerce.<sup>34</sup> An allegation that the defendant owned and operated a line of steam railway through the state of Indiana and into the adjoining state of Illinois and Ohio, and that it was engaged in hauling and carrying both freight and passengers on its line of railway in and through the aforesaid states, was sufficient to show that the carrier was engaged in interstate commerce.<sup>35</sup> A complaint alleging that the defendant's line of railroad, extending from a point in one state to a point in another, was used in interstate commerce, and that the plaintiff was employed as a bridge carpenter upon such railroad, was sufficient to show the interstate engagement of one and the interstate employment of the other.<sup>36</sup>

**§ 690. Allegation to Show Cause of Action Under the Federal Act Held not Sufficient.** An allegation that "at the time of the injuries hereinafter complained of, your petitioner was engaged in the transportation of interstate commerce" was held not to state a cause of action under the national Employers' Liability Act

32. *McIntosh v. St. Louis & S. F. R. Co.*, 182 Mo. App. 288, 168 S. W. 821. The correctness of this ruling is doubtful.

33. *Seaboard Air Line Ry. v. Duvall*, 225 U. S. 477, 56 L. Ed. 1171, 32 Sup. Ct. 790.

34. *Rowlands v. Chicago & N.*

*W. R. Co.*, 149 Wis. 51, Ann Cas. 1916E 714, 135 N. W. 156.

35. *Cincinnati, H. & D. Ry. Co. v. Gross*, — Ind. App. —, 111 N. E. 653.

36. *Camp v. Atlanta & C. Air Line R. Co.*, 100 S. C. 294, 84 S. E. 825.

for the reason that there was no further allegation that the railroad company was a common carrier by railroad engaged in interstate commerce at the time of the injury.<sup>37</sup> In another case it was alleged in the petition that the plaintiff was injured through the negligence of a co-employee, while loading rails on a car. The petition did not disclose where the rails came from or where destined or the destination of the car after being loaded or whether the rails were old or new. The court held that the allegation was insufficient to show employment in interstate commerce.<sup>38</sup>

**§ 691. In Cases of Death Petition Must Allege Survival of Beneficiaries Named in Statute.** Unless the petition discloses, in case of death, that the deceased left a widow, child, parent or dependant next of kin, naming them, it does not allege a cause of action under the federal act.<sup>39</sup> Where the petition failed to allege that decedent left any of the beneficiaries for whose benefit a right of action survives under the federal act, the

37. *Waiton v. Southern Ry. Co.* 179 Fed. 175. *Contra*, *McIntosh v. St. Louis & S. F. R. Co.*, 182 Mo. App. 288, 168 S. W. 821.

38. *Tsmura v. Great Northern R. Co.*, 58 Wash. 316, 108 Pac. 774.

39. **United States.** *Seaboard Air Line Ry. v. Koennecke*, 239 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 126, 11 N. C. C. A. 165; *North Carolina Ry. Co. v. Zachary*, 232 U. S. 218, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C 159; *Gulf C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. Ed. 785, 33 Sup. Ct. 426, 3 N. C. C. A. 806; *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 33 Sup. Ct. 192, 3 N. C. C. A. 807, Ann. Cas. 1914C 176; *Illinois Cent. R. Co. v. Stewart*, 138 C. C. A. 444, 223 Fed. 30; *Moffett v. Baltimore & O. R. Co.*,

135 C. C. A. 607, 220 Fed. 39; *Thomas v. Chicago & N. W. Ry. Co.*, 202 Fed. 766; *Bankson v. Illinois Cent. R. Co.*, 196 Fed. 171.

**Connecticut.** *Farley v. New York, N. H. & H. R. Co.*, 87 Conn. 328, 87 Atl. 990.

**Kentucky.** *Cincinnati N. O. & T. P. R. Co. v. Tucker*, 168 Ky. 144, 181 S. W. 940; *Cincinnati, N. O. & T. P. R. Co. v. Wilson's Adm'r*, 157 Ky. 460, 51 L. R. A. (N. S.) 308, 163 S. W. 493; *Illinois Cent. R. Co. v. Doherty's Adm'r*, 153 Ky. 363, 155 S. W. 1119, 47 L. R. A. (N. S.) 31.

**Montana.** *Melzner v. Northern Pac. R. Co.*, 46 Mont. 277, 127 Pac. 1002.

**Oregon.** *Kamboris v. Oregon-Washington R. & Nav. Co.*, 75 Ore. 358, 146 Pac. 1097.

petition is defective even though it is alleged that by reason of the facts alleged a cause of action had accrued to plaintiff against defendant under and by virtue of that act.<sup>40</sup> If the petition in an action under the federal act fails to allege that the decedent is survived by a person or persons coming within one of the three classes mentioned in the statute, it is bad on demurrer.<sup>41</sup> The petition must state, in case of death, how many children there are and their ages.<sup>42</sup>

**§ 692. Petition Must Allege Pecuniary Loss to Beneficiaries.** In an action under the federal act for the negligent death of a deceased employe, the petition must allege that the beneficiaries named, suffered pecuniary loss from the death.<sup>43</sup> The federal statute

40. *Thomas v. Chicago & N. W. Ry. Co.*, 202 Fed. 766.

41. *Illinois Cent. R. Co. v. Doherty's Adm'r*, 153 Ky. 363, 47 L. D. A. (N. S.) 31, 155 S. W. 1119.

42. *Chesapeake & O. Ry. Co. v. Dwyer's Adm'r*, 157 Ky. 590, 163 S. W. 752.

43. *United States. Seaboard Air Line Ry. v. Koennecke*, 239 U. S. 352, 60 L. Ed. 324, 36 Sup. Ct. 126, 11 N. C. C. A. 165; *Illinois Cent. R. Co. v. Stewart*, 138 C. C. A. 444, 223 Fed. 30; *Moffett v. Baltimore & O. R. Co.*, 135 C. C. A. 607, 220 Fed. 39; *Garrett v. Louisville & N. R. Co.*, 117 C. C. A. 109, 197 Fed. 715, 3 N. C. C. A. 769.

*Connecticut. Farley v. New York, N. H. & H. R. Co.*, 87 Conn. 328, 87 Atl. 990.

*Kansas. Griffith v. Midland Valley R. Co.*, — Kan. —, 166 Pac. 467.

*Kentucky. Louisville & N. R. Co. v. Thomas' Adm'r*, 150 Ky. 145, 185 S. W. 840; *Louisville &*

*N. R. Co. v. Holloway's Adm'r*, 168 Ky. 262, 181 S. W. 1126; *Louisville & N. R. Co. v. Holloway's Adm'r*, 163 Ky. 125, 173 S. W. 343; *Illinois Cent. R. Co. v. Doherty's Adm'r*, 153 Ky. 363, 47 L. R. A. (N. S.) 31, 155 S. W. 1119.

*South Carolina. Berg v. Atlantic Coast Line R. Co.*, — S. C. —, 93 S. E. 390.

*Tennessee. Carolina, C. & O. Ry. Co. v. Shewalter*, 128 Tenn. 363, Ann. Cas. 1915C 6051, 161 S. W. 1136.

When the petition shows the relationship of the dependent to the deceased, a general averment that the person for whose benefit the action was brought, was dependent upon the deceased and had a pecuniary interest in his life and suffered a pecuniary loss by his death, is sufficient without setting out in detail the reasons showing the dependency or the extent of the pecuniary loss. *Louisville & N. R. Co. v. Holloway's Adm'r*, *supra*.

does not presume that any of the beneficiaries are dependent upon the decedent, and as the statute is compensatory, and not penal, such a fact must be alleged, as proof of it is required.<sup>44</sup> But where a declaration was defective because of the omission of this necessary allegation, and the point was not raised until the case reached the appellate court, it was held that the objection came too late.<sup>45</sup> In affirming the decision of the federal Circuit Court of Appeals in the Garrett case, cited in the notes, the Supreme Court of the United States said: "Where any fact is necessary to be proved in order to sustain the plaintiff's right of recovery the declaration must contain an averment substantially of such fact in order to let in the proof. Every issue must be founded upon some certain point so that the parties may come prepared with their evidence and not be taken by surprise and the jury may not be misled by the introduction of various matters. *Bank of the United States v. Smith*, 11 Wheat. 171, 174; *Minor v. Mechanics' Bank*, 1 Pet. 46, 67; *De Luca v. Hughes*, 96 Fed. Rep. 923, 925; *Rose v. Perry*, 8 Yerg. 156; *Citizens' St. R. R. v. Burke*, 98 Tennessee, 650; 1 Chitty on Pleading, 270. . . . The plaintiff's declaration contains no positive averment of pecuniary loss to the parents for whose benefit the suit was instituted. Nor does it set out facts or circumstances adequate to apprise the defendant with reasonable particularity that such loss in fact was suffered. Common experience teaches that financial damage to a parent by no means follows as a necessary consequence upon the death of an adult son. The plaintiff expressly declined in both courts below so to amend his declaration as to allege pecuniary loss to

44. *Garrett v. Louisville & N. R. Co.*, 235 U. S. 308, 59 L. Ed. 242, 35 Sup. Ct. 32, 3 N. C. C. A. 769; *Gulf, C. & S. F. Ry. Co. v. McGinnis*, 228 U. S. 173, 57 L. Ed. 785, 33 Sup. Ct. 426, 3 N. C. C. A. 806, *Michigan Cent. R. Co. v.*

*Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 33 Sup. Ct. 192, 3 N. C. C. A. 807, *Ann. Cas.* 1914C 176.  
45. *Illinois Cent. R. Co. v. Porter*, 125 C. C. A. 55, 207 Fed. 311.

the parents; and judgment properly went against him. The request is now made that in view of all the circumstances—especially the former undetermined meaning of the statute, this court remand the cause for a new trial upon the declaration being so amended as to include the essential allegation. But we do not think such action would be proper. The courts below committed no error of which just complaint can be made here; and the rights of the defendant must be given effect, notwithstanding the unusual difficulties and uncertainties with which counsel for the plaintiff found himself confronted.” In an action by an administrator on behalf of the parents of an unmarried adult son under the Federal Act it is not necessary to allege in the petition that the parents were dependent upon the decedent. An allegation that they had a reasonable expectation of pecuniary benefit from a continuation of his life, with a recital of facts upon which such expectation was based, is sufficient.<sup>46</sup>

**§ 693. In Suits Under State or Common Law, Applicability of Federal Act may be Raised by Answer.**

In any action against a common carrier by railroad by an employe for personal injuries due to negligence, it will be presumed, in the absence of allegations to the contrary in the petition, that the plaintiff is seeking a remedy under the laws of the state and not under the federal act.<sup>47</sup> However, if the injury occurred or the death happened while the common carrier was engaged in interstate commerce and the injured employe was working for it in such commerce, such facts may be set

46. *Berg v. Atlantic Coast Line R. Co.*, — S. C. —, 93 S. E. 390.

47. *Idaho*. *Neil v. Idaho & W. N. R.* 22 *Idaho* 74, 125 *Pac.* 331.

*Iowa*. *Bradbury v. Chicago, R. I. & P. R. Co.*, 149 *Iowa* 51, 40 *L. R. A.* (N. S.) 684, 128 *N. W.* 1.

*North Carolina*. *Fleming v.*

*Norfolk Southern R. Co.*, 160 *N. C.* 196, 76 *S. E.* 212.

*Ohio*. *Erie R. Co. v. Welsh*, 89 *Ohio St.* 81, 105 *N. E.* 190.

*Texas*. *Missouri, K. & T. R. Co. of Texas v. Neaves*, 60 *Tex. Civ. App.* 305, 127 *S. W.* 1090; *Missouri, K. & T. R. Co. of Texas v. Hawley*, 58 *Tex. Civ. App.* 148, 123 *S. W.* 726.

up in the answer by the defendant and, if proven, will defeat the plaintiff's attempt to recover under the laws of the state.<sup>48</sup>

**§ 694. Where Petition is Under State Law and Evidence Shows Case Under Federal Statute, Plaintiff Cannot Recover.** When the petition in an action by an injured employe against a common carrier by railroad for damages, states facts which constitute a cause of action solely under the laws of a state, and the evidence discloses that at the time he was injured the employe was engaged in interstate commerce and that the defendant was so engaged, there is a variance between the pleading and the proof, because the case pleaded is not the case proven and the case proven is not the case pleaded.<sup>49</sup> If the defendant, therefore, raises the

**48. United States.** *Osborne v. Gray*, 241 U. S. 16, 60 L. Ed. 865, 36 Sup. Ct. 486; *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. Ed. 1129, 33 Sup. Ct. 651, Ann. Cas. 1914C 156.

**Iowa.** *Ross v. Sheldon*, 176 Iowa 618, 154 N. W. 499.

**Pennsylvania.** *Hogarty v. Philadelphia & R. R. Co.*, 255 Pa. 236 99 Atl. 741.

**Vermont.** *Carpenter v. Central Vermont R. Co.*, 90 Vt. 35, 96 Atl. 373.

**Wisconsin.** *Zavitovski v. Chicago M. & St. P. R. Co.*, 161 Wis 461, 154 N. W. 974.

**49. United States.** *Osborne v. Gray*, 241 U. S. 16, 60 L. Ed. 865, 36 Sup. Ct. 486; *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. Ed. 1226, 34 Sup. Ct. 729, 6 N. C. C. A. 224; *Atlantic C. L. R. Co. v. Woods* 151, C. C. A. 651, 238 Fed. 917.

**Arkansas.** *St. Louis, I. M. & S. R. Co. v. Coke*, 118 Ark. 49, 175 S. W. 1177.

**Colorado.** *Denver & R. G. R. Co. v. Wilson*, — Colo. —, 163 Pac. 857.

**Florida.** *Seaboard Air Line Ry. v. Hess*, — Fla. —, 74 So. 500; *Flanders v. Georgia, Southern & F. R. Co.*, 68 Fla. 479, 67 So. 68.

**Iowa.** *Armbruster v. Chicago, R. I. & P. R. Co.*, 166 Iowa 155, 147 N. W. 337.

**Kansas.** *Giersch v. Atchison, T. & S. F. R. Co.*, 98 Kan. 452, 158 Pac. 54.

**Kentucky.** *Cincinnati, N. O. & T. P. Ry. Co. v. Tucker*, 168 Ky. 144, 181 S. W. 940; *Illinois Cent. R. Co. v. Kelly*, 167 Ky. 745, 181 S. W. 375.

**Louisiana.** *Penny v. New Orleans Great Northern R. Co.*, 135 La. 962, 66 So. 313.

**Missouri.** *Sells v. Atchison, T. & S. F. R. Co.*, 266 Mo. 155, 181 S. W. 106; *Carpenter v. Kansas City Southern R. Co.*, 189 Mo. App. 164, 175 S. W. 234.

**New York.** *Chrosciel v. New*



objection in the proper manner according to the rules of pleading and practice of the state where the action is pending, the plaintiff cannot recover and the defendant is not estopped from raising the point although he pleaded in his answer defenses which are solely applicable to the laws of the state.<sup>59</sup> In the case of *St. Louis, S. F. & T. R. Co. v. Seale*, cited in the notes,

York, Cent. & H. River R. Co., — N. Y. App. Div. —, 159 N. Y. Supp. 924.

North Carolina. *Ingle v. Southern R. Co.*, 167 N. C. 636, 83 S. E. 744.

North Dakota. *Hein v. Great Northern R. R.*, 34 N. D. 440, 159 N. W. 14.

Oregon. *Kamboris v. Oregon-Washington R. & Nav. Co.*, 75 Or. 358, 146 Pac. 1097.

Pennsylvania. *Hogarty v. Philadelphia & R. R. Co.*, 255 Pa. 236, 99 Atl. 741.

South Carolina. *Koennecke v. Seaboard Air Line Ry.*, 101 S. C. 86, 85 S. E. 374.

Texas. *Geer v. St. Louis, S. F. & T. Ry. Co.*, — Tex. —, 194 S. W. 939.

Vermont. *Carpenter v. Central Vermont R. Co.*, 90 Vt. 35, 96 Atl. 373.

Wisconsin. *Calhoun v. Great Northern R. Co.*, 162 Wis. 264, 156 N. W. 198.

50. United States. *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. Ed. 1129, 33 Sup. Ct. 651, 3 N. C. C. A. 800, Ann. Cas. 1914C 156; *Winfree v. Northern Pac. R. Co.*, 227 U. S. 296, 57 L. Ed. 518, 33 Sup. Ct. 273; *Illinois Cent. R. Co. v. Stewart*, 138 C. C. A. 444, 223 Fed. 30.

Arkansas. *Midland Valley R. Co. v. Ennis*, 109 Ark. 206, 159 S. W. 214.

Colorado. *Denver & R. G. R.*

*Co. v. Wilson*, — Colo. —, 163 Pac. 857.

Michigan. *Gaines v. Detroit, G. H. & M. R. Co.*, 181 Mich. 376, 148 N. W. 397.

Missouri. *Moliter v. Wabash R. Co.*, 180 Mo. App. 84, 168 S. W. 250.

South Carolina. *Mims v. Atlantic Coast Line R. Co.*, 100 S. C. 375, 85 S. E. 372.

Texas. *Geer v. St. Louis, S. F. & T. Ry. Co.*, — Tex. —, 194 S. W. 939.

In *Toledo, St. L. & W. R. Co. v. Slavin*, 236 U. S. 454, 59 L. Ed. 671, 35 Sup. Ct. 306, an action by an employe against a common carrier by railroad for personal injuries, neither the plaintiff's complaint nor the defendant's answer contained any reference to the Federal Employers' Liability Act. But notwithstanding this failure to plead the Federal Act in the answer, evidence was admitted, over plaintiff's objection, which showed that the train on which plaintiff was riding at the time of the injury was engaged in interstate commerce. After the introduction of this evidence, the railroad company insisted that the case was governed by the Federal Act and moved the court for a directed verdict in its favor. This request having been refused, the defendant asked the court to give to the jury in its charge several applicable extracts

the plaintiff's petition stated a cause of action under the statute of the state, but the evidence disclosed that the

from the federal statute. These requests were refused, the trial court holding that the state law governed as to assumption of risk. A verdict for the plaintiff resulted. On a writ of error from a common pleas court where the case was tried to the circuit court, the latter court held that as the plaintiff was injured while engaged in interstate commerce, the cause was governed by the Federal Statute and the common law rule of assumption of risk applied and that the defendant's motion for a directed verdict should have been granted. On appeal to the Supreme Court of Ohio the judgment of the circuit court was reversed and that of the common pleas court was affirmed. In reversing the judgment of the Supreme Court of Ohio, the United States Supreme Court held that if a suit is brought under a state law and the evidence shows that the federal act is applicable, there can be no recovery. The court said: "The case having been brought here by writ of error, counsel for the plaintiff, Slavin, insists that the judgment of reversal, without opinion, should not be construed as meaning that the State court decided the Federal question adversely to the Company's claim; but rather as holding that the defendant's failure to plead the Employers' Liability Act made it improper to consider evidence that the plaintiff had been engaged in interstate commerce, and, hence, that there was nothing properly in this record to support the contention that the defendant had been deprived

of a Federal right. But a controlling Federal question was necessarily involved. For, when the plaintiff brought suit on the State statute the defendant was entitled to disprove liability under the Ohio Act, by showing that the injury had been inflicted while Slavin was employed in interstate business. And, if without amendment, the case proceeded with the proof showing that the right of the plaintiff and the liability of the defendant had to be measured by the Federal statute, it was error not to apply and enforce the provisions of that law. In this respect the case is much like *St. Louis, etc., Ry. v. Seale*, 229 U. S. 156, where the suit was brought under the Texas statute, but the testimony showed that the plaintiff was injured while engaged in interstate commerce. The court said: 'When the evidence was adduced it developed that the real case was not controlled by the State statute but by the Federal statute. In short, the case pleaded was not proved and the case proved was not pleaded. In that situation the defendant interposed the objection, grounded on the Federal statute, that the plaintiffs were not entitled to recover on the case proved. We think the objection was interposed in due time and that the State court erred in overruling it.' The principle of that decision and others like it is not based upon any technical rule of pleading but is matter of substance, where, as in the present case, the terms of the two statutes differ

decendent was killed while engaged in interstate commerce. The court reversed the judgment, and said: "It comes, then, to this: the plaintiff's petition, as ruled by the state court, stated a case under the state statute. . . . When the evidence was adduced it developed that the real case was not controlled by the state statute, but by the federal statute. In short, the case pleaded was not proved, and the case proved was not pleaded."

**§ 695. Defendant in Suit Under State Law Must Specifically Plead Facts Under Federal Act to Defeat Recovery.** On the other hand, if the plaintiff's petition states a cause of action under the laws of the state and his evidence establishes and is in harmony with the allegations of his petition, the fatal variance in plaintiff's proof, which appeared in the cases cited in the preceding paragraph, is non-existent and the defendant, in order to defeat a recovery under the state law by showing that the case is one arising under the federal act, must plead the facts showing that the plaintiff at the time of the injury was employed in interstate commerce and that the carrier was so engaged at the same time. Unless such a plea is made such evidence is not ad-

in essential particulars. Here the Ohio statute abolished the rule of the common law as to the assumption of risks in injuries occasioned by defects in tracks, while the Federal statute left that common law rule in force, except in those instances where the injury was due to the defendant's violation of Federal statutes, which—like the Hours of Labor Law and the Safety Appliance Act—were passed for the protection of interstate employees. *Seaboard Air Line v. Horton*, 233 U. S. 492, 503. In all other respects this case is exactly within the ruling in the case last cited, where the

employee's knowledge of the existence of the defect and the terms of the State statute relied on were substantially the same as those in the present case. There the judgment of the State court—applying the State statute—was reversed because it appeared, as it does here, that the plaintiff had been injured while engaged in interstate commerce and, consequently, the case should have been tried and determined according to the Federal Employers' Liability Act. The judgment of the Supreme Court of Ohio is reversed and the case remanded for further proceedings not inconsistent with this opinion."

missible on behalf of the defendant.<sup>51</sup> Where the defendant files such a plea in an amended answer after the evidence was all in, it was held not to be in abuse of discretion for the trial court, on motion of plaintiff, to strike out the amendment.<sup>52</sup> Cases holding that when a widow is suing in her individual capacity for the death of an interstate employe, her want of capacity to sue may be raised at any stage of the proceedings without the point being raised by answer, are not in conflict with the cases just cited, for the reason that the defeat or want of legal capacity appears on the face of

51. **United States.** *Atlantic Coast Line R. Co. v. Mims*, 242 U. S. 532, 61 L. Ed. 476, 37 Sup. Ct. 188; *Illinois Cent. R. Co. v. Nelson*, 128 C. C. A. 525, 212 Fed. 69.

**Colorado.** *Denver & R. G. R. Co. v. Wilson*, — Colo. —. 163 Pac. 857.

**Georgia.** *Southern R. Co. v. Ansley*, 8 Ga. App. 325, 68 S. E. 1086.

**Indiana.** *Grand Trunk Western Ry. Co. v. Thrift Trust Co.*, — Ind. —, 115 N. E. 685.

**Iowa.** *Bradbury v. Chicago, R. I. & P. R. Co.*, 40 L. R. A. (N. S.) 684, 149 Iowa 51, 128 N. W. 1.

**Kansas.** *Giersch v. Atchison, T. & S. F. R. Co.*, 98 Kan. 452, 158 Pac. 54; *Cole v. Atchison, T. & S. F. R. Co.*, 92 Kan. 132, 139 Pac. 1177.

**Missouri.** *Taber v. Missouri Pac. Ry. Co.*, — Mo. —. 186 S. W. 688.

**New York.** *Rodgers v. New York, Cent. & H. River R. Co.*, 171 N. Y. App. Div. 385, 157 N. Y. Supp. 83; *Bitondo v. New York Cent. & H. River R. Co.*, 163 N. Y. App. Div. 823, 149 N. Y. Supp. 339; *Tyndall v. New York, Cent. & H. River R. Co.*, 162 N. Y.

App. Div. 921, 146 N. Y. Supp. 1115.

**North Carolina.** *Ingle v. Southern R. Co.*, 167 N. C. 636, 83 S. E. 744; *Fleming v. Norfolk Southern R. Co.*, 160 N. C. 196, 76 S. E. 212.

**Ohio.** *Erie R. Co. v. Welsh*, 89 Ohio St. 81, 105 N. E. 189.

**South Carolina.** *Koennecke v. Seaboard Air Line Ry.*, 101 S. C. 86, 85 S. E. 374; *Mims v. Atlantic Coast Line R. Co.*, 100 S. C. 375, 85 S. E. 372.

**Texas.** *Chicago, R. I. & G. Ry. Co. v. Rogers*, — Tex. Civ. App. —, 150 S. W. 281.

**Vermont.** *Carpenter v. Central Vermont Ry. Co.*, 90 Vt. 35, 96 Atl. 373.

**Wisconsin.** *Graber v. Duluth, S. S. & A. R. Co.*, 159 Wis. 414, 150 N. W. 489.

*Contra:* *Atlantic Coast Line R. Co. v. Woods*, 151 C. C. A. 651, 238 Fed. 917; *Vandalia R. Co. v. Stringer*, 182 Ind. 676, 106 N. E. 865, 107 N. E. 673; *Gray v. Chicago & N. W. R. Co.*, 153 Wis. 637, 142 N. W. 505.

52. *Bradbury v. Chicago, R. I. & P. R. Co.*, 149 Iowa 51, 40 L. R. A. (N. S.) 684, 128 N. W. 1.

plaintiff's pleadings.<sup>53</sup> "The state court having jurisdiction to entertain the action under both statutes, its proceedings must be judged by its own practice, which requires an answer which shall contain a statement of any new matter constituting a defense. R. S. sec. 1806. It follows, from the statement in the petition of all the facts necessary to constitute a perfect cause of action under the state statute, that if it is sought to defeat it, by showing the additional facts that the injury was inflicted while the defendant was engaging in interstate commerce, and while the deceased was employed by it in such commerce, those facts should have been pleaded in the answer. This was the first step provided by the Missouri Code for presenting such matters for the determination of the court. At the trial it was stated in evidence that one of the objects of the work in which deceased was engaged was the making up of a train to go west to some destination not named and by some of the several lines of the defendant's railroad that cross the western frontier of the state at various distances from Kansas City, and that certain cars bore initials, the meaning of which is not stated, but of which counsel for defendant asks us to take judicial notice. If this testimony tended to prove that the appellant and deceased were engaged in interstate commerce at the time of the injury, there was still an opportunity under the Missouri Code for the defendant to conform his answer to such evidence and to have the question submitted to the jury. Instead of doing this, he asked, and the court granted, its submission upon the theory, inconsistent with the terms of the federal statute."<sup>54</sup>

53. *United States. American R. Co. of Porto Rico v. Birch*, 224 U. S. 547, 56 L. Ed. 879, 32 Sup. Ct. 603.

*Louisiana. La Casse v. New Orleans, T. & M. R. Co.*, 135 La. 129, 64 So. 1012.

*Missouri. Dungan v. St. Louis & S. F. R. Co.*, 178 Mo. App. 164, 165 S. W. 1116; *Vaughan v. St.*

*Louis & S. F. R. Co.*, 177 Mo. App. 155, 164 S. W. 144.

*Oklahoma. Missouri, K. & T. R. Co. v. Lenahan*, 39 Okla. 283, 135 Pac. 383.

*Tennessee. Cincinnati, N. O. & T. P. R. Co. v. Bonham*, 130 Tenn. 435, 171 S. W. 79.

54. *Taber v. Missouri Pac. Ry. Co.*, — Mo. —, 186 S. W. 688,

**§ 696. Amendment Setting up New Cause of Action After Two-Year Period of Limitation not Allowed.** It is provided in section 6 of the Employers' Liability Act that no action shall be maintained under the statute unless commenced within two years from the day the cause of action accrued. All actions, therefore, for injuries or deaths arising in interstate commerce must be instituted within two years from the day the cause of action accrued.<sup>55</sup> To this extent there has been no diversity of opinion among the courts or much difficulty in the application to concrete facts. But when a suit is instituted for personal injuries or death of an employe within the time limited by the statute and the plaintiff, after the lapse of two years, amends his petition or complaint, the commencement of the suit within the two years does not prevent the running of the statute of limitation against such an amendment if the amended petition or declaration introduces a new or different cause of action from that stated in the original complaint; for, while a new cause of action may be introduced by amendment, the established limitation on the operation of its relation to the commencement of the suit is, that if the amendment introduces new matter or a different cause of action not with the *lis pendens*, as to which the statute has operated as a bar at the time of making the amendment, it is as available as if the amendment were a new and independent suit.<sup>56</sup> A cause

aff'd in 244 U. S. 200, 61 L. Ed. 1082, 37 Sup. Ct. 522.

55. Chapter 33, *supra*.

56. *United States. Seaboard Air Line Ry. v. Renn*, 241 U. S. 290, 60 L. Ed. 1006, 36 Sup. Ct. 567; *Atlantic Coast Line R. Co. v. Burnette*, 239 U. S. 199, 60 L. Ed. 226, 36 Sup. Ct. 75; *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. Ed. 355, 33 Sup. Ct. 135, Ann. Cas. 1914B 134; *United States v. Martinez*, 195 U. S. 469, 49 L. Ed. 282, 25 Sup. Ct. 80; *Atlantic & P. R. Co. v. Laird*,

164 U. S. 393, 41 L. Ed. 485, 17 Sup. Ct. 120; *Union Pac. Ry. Co. v. Wyler*, 158 U. S. 285, 39 L. Ed. 983, 15 Sup. Ct. 877; *The Harrisburg*, 119 U. S. 199, 30 L. Ed. 358, 7 Sup. Ct. 140; *Sicard v. Davis*, 6 Pet. 124, 8 L. Ed. 342; *Holmes v. Trout*, 7 Pet. 171, 8 L. Ed. 647; *Walker v. Iowa Cent. Ry. Co.*, 241 Fed. 395; *Lang v. Choctaw, O. & G. R. Co.*, 117 C. C. A. 146, 198 Fed. 38; *St. Louis & S. F. R. Co. v. Loughmiller*, 193 Fed. 689; *Tiller v. St. Louis & S. F. R. Co.*, 189 Fed. 994;

of action created by the Federal Act is separate and distinct from a cause of action created by the law of a

**Mitchell Coal & Coke Co. v. Pennsylvania R. Co.**, 181 Fed. 403; **De Valle Da Costa v. Southern Pac. Co.**, 167 Fed. 654; **Hall v. Louisville & N. R. Co.**, 157 Fed. 464; **Boston & M. R. v. Hurd**, 47 C. C. A. 615, 108 Fed. 116, 56 L. R. A. 193; **Whalen v. Gordon**, 37 C. C. A. 70, 95 Fed. 305; **Atlanta, K. & N. Ry. Co. v. Hooper**, 35 C. C. A. 24, 92 Fed. 820.

**Alabama.** **Barker v. Anniston O. & O. St. Ry. Co.**, 92 Ala. 314, 8 So. 466; **Alabama Great Southern R. Co. v. Smith**, 81 Ala. 229, 1 So. 723.

**Arizona.** **Kain v. Arizona Copper Co.**, 14 Ariz. 566, 133 Pac. 412.

**California.** **Campbell v. Campbell**, 133 Cal. 33, 65 Pac. 134; **Brown v. Mann**, 68 Cal. 517, 9 Pac. 549.

**Georgia.** **Gilleland & Dillingham v. Louisville & N. R. Co.**, 119 Ga. 789, 47 S. E. 336; **Shepherd v. Southern Pine Co.**, 118 Ga. 292, 45 S. E. 220; **Bolton v. Georgia Pac. Ry. Co.**, 83 Ga. 659, 10 S. E. 352; **Exposition Cotton Mills v. Western & A. R. Co.**, 83 Ga. 441, 10 S. E. 113; **Parmelee v. Savannah, F. & W. Ry.**, 78 Ga. 239, 2 S. E. 686.

**Illinois.** **Illinois Cent. R. Co. v. Campbell**, 170 Ill. 163, 49 N. E. 314; **Eylenfeldt v. Illinois Steel Co.**, 165 Ill. 185, 46 N. E. 266.

**Iowa.** **Van Patten v. Waugh**, 122 Iowa 302, 98 N. W. 119; **Box v. Chicago, R. I. & P. Ry. Co.**, 107 Iowa 660, 78 N. W. 694; **Kuhns v. Wisconsin, I. & N. Ry. Co.**, 76 Iowa 67, 40 N. W. 92.

**Kansas.** **Brinkmeier v. Missouri Pac. R. Co.**, 81 Kan. 101, 105 Pac.

221; **City of Kansas City v. Hart**, 60 Kan. 684, 57 Pac. 938; **Atchison, T. & S. F. R. Co. v. Schroeder**, 56 Kan. 731, 44 Pac. 1093.

**Michigan.** **Hurst v. Detroit City Ry. Co.**, 84 Mich. 539, 48 N. W. 44.

**Missouri.** **Holliday v. Jackson**, 21 Mo. App. 660.

**Nebraska.** **Johnson v. American Smelting & Refining Co.**, 80 Nebr. 255, 116 N. W. 517; **Buerstetta v. Tecumseh Nat. Bank**, 57 Neb. 504, 77 N. W. 1094.

**New Jersey.** **Fitzhenry v. Consolidated Traction Co.**, 63 N. J. L. 142, 42 Atl. 416.

**North Dakota.** **Woodward v. Northern Pac. R. Co.**, 16 N. D. 38, 111 N. W. 627.

**Pennsylvania.** **Allen v. Tuscarora Val. R. Co.**, 229 Pa. St. 97, 30 L. R. A. (N. S.) 1096, 140 Am. St. Rep. 714, 78 Atl. 44; **Martin v. Pittsburg Rys. Co.**, 227 Pa. 18, 26 L. R. A. (N. S.) 1221, 19 Ann. Cas. 818, 75 Atl. 837; **Grier v. Northern Assur. Co.**, 183 Pa. St. 334, 39 Atl. 10; **Fairchild v. Dunbar Furnace Co.**, 128 Pa. St. 485, 18 Atl. 443, 444.

**South Carolina.** **Lilly v. Charlotte, C. & A. R. Co.**, 32 S. C. 142, 10 S. E. 932.

**Texas.** **Phoenix Lumber Co. v. Houston Water Co.**, 94 Tex. 456, 61 S. W. 707; **Cotton v. Rand**, 93 Tex. 7, 53 S. W. 343; **International & G. N. R. Co. v. Pape**, 73 Tex. 501, 11 S. W. 526.

"But an amendment which introduces a new or different cause of action, and makes a new or different demand, not before introduced or made in the pending suit, does not relate back to the

state or arising under the common law.<sup>57</sup> Two wholly unconnected statutes imposing duties of different natures can no more constitute the basis of a single right of action than two unrelated contracts.<sup>58</sup> It therefore follows that an amendment to a petition predicated liability solely upon the common law or upon the statute of a state, cannot be amended after the two year period of limitation so as to state facts constituting a cause of action under the federal act if proper and seasonable objection is made thereto.<sup>59</sup> Illustrating this principle, it appeared in one case that a station employe of a common carrier injured while pushing a baggage truck, filed a suit for damages, and more than two years after the accident, by leave of court, filed an amendment to his original petition in which, for the first time, he sought a

beginning of the action so as to stop the running of the suit, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed." *Pattillo v. Allen-West Commission Co.*, 65 C. C. A. 508, 131 Fed. 680.

"But if it (the amendment) introduced a new or different cause of action, it was the equivalent of a new suit, as to which the running of the limitation was not theretofore arrested." *Seaboard Air Line Ry. v. Renn*, *supra*.

57. *United States. St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. Ed. 1129, 33 Sup. Ct. 651, Ann. Cas. 1914C 156; *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. Ed. 785, 33 Sup. Ct. 426; 3 N. C. C. A. 806, *Winfree v. Northern Pac. R. Co.*, 227 U. S. 296, 57 L. Ed. 518, 33 Sup. Ct. 273; *American R. Co. of Porto Rico v. Didricksen*, 227 U. S. 145, 57 L. Ed. 456, 33 Sup. Ct. 224.

*Arkansas. Midland Val. R. Co. v. Ennis*, 109 Ark. 206, 159 S. W. 214.

*Michigan. Gaines v. Detroit, G. H. & M. R. Co.*, 181 Mich. 376, 148 N. W. 397.

*Missouri. Moliter v. Wabash R. Co.*, 180 Mo. App. 84, 168 S. W. 250.

*New York. Tyndall v. New York, Cent. & H. River R. Co.*, 213 N. Y. 691, 107 N. E. 577.

"As the first petition proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas statute, it was a departure from law to law." *Union Pac. Ry. Co. v. Wyler*, 158 U. S. 285, 39 L. Ed. 983, 15 Sup. Ct. 877.

58. *Findley v. Coal & Coke R. Co.*, 76 W. Va. 747, 87 S. E. 198.

59. *United States. Seaboard Air Line Ry. v. Renn*, 241 U. S. 290, 60 L. Ed. 1006, 36 Sup. Ct. 567; *Walker v. Iowa Cent. Ry. Co.*, 241 Fed. 395.



recovery on the ground that his cause of action was under the federal act. In his original petition he did not allege that the carrier was engaged or that he was employed in interstate commerce; nor did the petition state any facts from which such a conclusion could be inferred. In sustaining a demurrer to the amended petition, the court considered the amendment a clear departure from the right of recovery alleged in the original petition.<sup>60</sup> In a suit by an employe against a carrier, averring a mere common law liability, the plaintiff amended his statement five years after the injury, alleging that he was employed in interstate commerce. It was held that an action under the federal act should not be sustained.<sup>61</sup> In a suit against a common carrier by railroad, a brakeman based his cause of action for injuries solely under the common law. After the expiration of the statute of limitation, he asked leave to file an amended petition setting up, for the first time, a cause of action under the Federal Safety Appliance Act. The defendant objected to the amendment on the ground that it introduced a new cause of action which was barred by the statute of limitation. The court, in deciding that the amendment stated a new cause of action, said:<sup>62</sup> "But, it will be observed, in the amendment there was a departure, not only from the facts as laid in the original statement, but also from the law as applicable to the facts in the original statement. In other words, there was a departure, not only from fact

**Kentucky.** *Baltimore & O. R. Co. v. Smith*, 169 Ky. 593, 184 S. W. 1108; *Cincinnati, N. O. & T. P. R. Co. v. Goode*, 163 Ky. 60, 173 S. W. 329.

**New York.** *Hughes v. New York O. & W. R. Co.*, 158 N. Y. App. Div. 443, 143 N. Y. Supp. 603.

**Pennsylvania.** *Hogarty v. Philadelphia & R. R. Co.*, 255 Pa. 236, 99 Atl. 741.

**Texas.** *Ft. Worth & R. G. Ry.*

*Co. v. Bird*, — Tex. Civ. App. —, 196 S. W. 597.

**West Virginia.** *Findley v. Coal & Coke Co.*, 76 W. Va. 747, 87 S. E. 198.

60. *Walker v. Iowa Cent. Ry. Co.*, 241 Fed. 395.

61. *Hogarty v. Philadelphia & R. R. Co.*, 255 Pa. 236, 99 Atl. 741.

62. *Allen v. Tuscarora Val. R. Co.*, 229 Pa. 97, 30 L. R. A. (N. S.) 1096, 140 Am. St. Rep. 714, 78 Atl. 34.

to fact, but from law to law. . . . The original statement, it is true, averred the injuries of the plaintiff and the alleged negligent act of the defendant by which they were caused but there was no intimation in the statement that the carrier was engaged in interstate commerce or that the defendant's cars were equipped with couplers in violation of the Act of Congress. Proof of the existence of these two additional facts was required to sustain the action as amended, and this is one of the tests in determining whether the amendment introduces a different cause of action. It is apparent that without this amendment the Act of Congress could have had no place in the case, and could not have been invoked to deprive the company of its defense that the plaintiff assumed the risks or dangers of his employment." Where an action for wrongful death was brought by the widow of a deceased employe as such under a state statute giving her alone a right of action for her sole benefit, an amendment to the declaration charging the relation in which she sued from that of widow to that of administratrix, for the benefit of herself as widow and her children, and changing her cause of action to one under the first Federal Employers' Liability Act, did not relate back to the time of the commencement of the original action so as to avoid the bar of the statute of limitation which had been run at the time the amendment was filed.<sup>63</sup> The validity of the first Employers' Liability Act was assumed in the Hall case. The facts therein are quite different from the decision of the national supreme court in *Missouri, K. & T. R. Co. v. Wulf*;<sup>64</sup> for in the Hall case, the widow was the sole plaintiff in the original petition but in the amended petition the widow and children were asserting rights. Neither did the original petition in the Hall case show any liability under the federal act as the original petition did in the Wulf case.

63. *Hall v. Louisville & N. R. Co.*, 157 Fed. 464, *aff'd* in 98 C. C. A. 664, 174 Fed. 1021.

64. 226 U. S. 570, 57 L. Ed. 355, 33 Sup. Ct. 135, Ann. Cas. 1914B 134. See section 696, *infra*.

**§ 697. Amendments Permissible after Two-Year Period of Limitation.** But, on the other hand, if an amendment to a complaint made after the two year period of limitation merely expands or amplifies what was alleged in support of the cause of action asserted in the original petition, the amendment relates back to the commencement of the action and is not affected by the intervening lapse of time.<sup>65</sup> A leading case on this question under the federal act is *Missouri, K. & T. R.Co.*

65. **United States.** *Seaboard Air Line Ry. Co. v. Renn*, 241 U. S. 290, 60 L. Ed. 1006, 36 Sup. Ct. 567; *Stewart v. Baltimore & O. R. Co.*, 168 U. S. 445, 42 L. Ed. 537, 18 Sup. Ct. 105; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. Ed. 829, 12 Sup. Ct. 905; *Sicard v. Davis*, 6 Pet. 124, 8 L. Ed. 342; *Bixler v. Pennsylvania R. Co.*, 201 Fed. 553; *Reardon v. Balaklala Consol. Copper Co.*, 193 Fed. 189; *Crotty v. Chicago Great Western R. Co.*, 95 C. C. A. 91, 169 Fed. 593; *Patillo v. Allen-West Commission Co.*, 65 C. C. A. 508, 131 Fed. 680; *McDonald v. State of Nebraska*, 41 C. C. A. 278, 101 Fed. 171; *Carnegie, Phipps & Co. v. Hulbert*, 16 C. C. A. 498, 70 Fed. 209; *Smith v. Missouri Pac. Ry. Co.*, 5. C. C. A. 557, 56 Fed. 458; *Buntin v. Chicago, R. I. & P. Ry. Co.*, 41 Fed. 744.

**Alabama.** *Alabama Great Southern R. Co. v. Chapman*, 83 Ala. 453, 3 So. 813.

**California.** *Smullen v. Phillips*, 92 Cal. 408, 28 Pac. 442.

**Georgia.** *Childers v. Adams*, 42 Ga. 352; *Atlanta, K. & N. R. Co. v. Smith*, 1 Ga. App. 162, 58 S. E. 106.

**Illinois.** *McCall v. Lee*, 120 Ill. 261, 11 N. E. 522; *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 24

L. R. A. 141, 41 Am. St. Rep. 278, 37 N. E. 247.

**Indiana.** *Lake Erie & W. R. Co. v. Town of Boswell*, 137 Ind. 336, 36 N. E. 1103.

**Kansas.** *Culp v. Steere*, 47 Kan. 746, 28 Pac. 987.

**Kentucky.** *Cincinnati, N. O. & T. P. R. Co. v. Goode*, 163 Ky. 60, 173 S. W. 329.

**Massachusetts.** *Wilson v. Welch*, 157 Mass. 77, 31 N. E. 712.

**Michigan.** *Wood v. Lenawee Circuit Judge*, 84 Mich. 521, 47 N. W. 1103.

**Missouri.** *Lilly v. Tobbein*, 103 Mo. 477, 23 Am. St. Rep. 887, 15 S. W. 618; *Smith v. Boese*, 39 Mo. App. 15; *Baker v. Missouri P. Ry. Co.*, 34 Mo. App. 98.

**North Carolina.** *Woodcock v. Bostic*, 128 N. C. 243, 38 S. E. 881; *Bray v. Creekmore*, 109 N. C. 49, 13 S. E. 723; *Wynne v. Liverpool & L. & G. Ins. Co.*, 71 N. C. 121.

**Texas.** *St. Louis, S. F. & T. Ry. Co. v. Smith*, — Tex. Civ. App. —, 171 S. W. 512; *St. Louis, S. F. & T. Ry. Co. v. Seale*, — Tex. Civ. App. —, 160 S. W. 317, 3 N. C. C. A. 800; *Tackett v. Mutual Realty Co.*, — Tex. Civ. App. —, 143 S. W. 347; *Tribby v. Wokee*, 74 Tex. 142, 11 S. W. 1089.

v. Wulf,<sup>66</sup> wherein the court held that an amendment after the two year period of limitation by which the plaintiff changed the capacity in which she sued from an individual to a personal representative, was proper. It appeared in the Wulf case that a mother, the sole heir and dependent of a deceased employe, sued in her individual capacity. In her first and original petition sufficient facts were alleged to show that his death was caused by injuries while the carrier was engaged and he was employed in interstate commerce, but the petition also referred to and asserted a right to sue under the laws of Kansas. After the two year period of limitation fixed by the federal act, the mother filed an amended petition in which she sued as administratrix, as required by the federal act, and not as an individual. Aside from the capacity in which she sued, there was no substantial difference between the original and amended petition, the same state of facts as to interstate commerce being alleged in both, that is, that the deceased was a locomotive fireman on a train bound from Kansas into Oklahoma. The change was in form rather than in substance, and it was held that the amended petition did not set up any different state of facts as a ground of action and therefore the amendment related back to the beginning of the suit notwithstanding that the plaintiff erroneously asserted her right to recover under the laws of the state. When the facts stated in a petition show liability exclusively under the federal act, the courts will take judicial notice that the state law was superseded and that the cause of action was not changed any more than if the plaintiff had referred to any other repealed statute. This case has sometimes been cited as authority for the proposition that a petition setting up no facts showing the engagement of the carrier and the employment by it of the servant in interstate commerce at the time of the injury, may be amended even after the two year period of

66. 226 U. S. 570, 57 L. Ed. 355, 33 Sup. Ct. 135, Ann. Cas. 1914B 134.

limitation so as to state a cause of action under the national statute. The decision does not, however, go to that length because the original petition sufficiently averred facts showing employment in interstate commerce, the sole change being the capacity in which the plaintiff sued. "It seems to us, however," said the court, "that, aside from the capacity in which the plaintiff assumed to bring her action, there is no substantial difference between the original and amended petitions. In the former, as in the latter, it was sufficiently averred that the deceased came to his death through injuries suffered while he was employed by the defendant railroad company in interstate commerce; that his death resulted from the negligence of the company and by reason of defects in one of its locomotive engines due to its negligence; and that since the deceased died unmarried and childless, the plaintiff, as his sole surviving parent, was the sole beneficiary of the action. It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress. But the court was presumed to be cognizant of the enactment of the Employers' Liability Act, and to know that with respect to the responsibility of interstate carriers by railroad to their employes injured in such commerce after its enactment it had the effect of superseding state laws upon the subject. Second Employers' Liability Cases, 223 U. S. 1, 53. Therefore the pleader was not required to refer to the Federal act, and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any other repealed statute would have done. It is true that under the Federal statute the plaintiff could not, although sole beneficiary, maintain the action except as personal representative. So it was held in *American Railroad Co. v. Birch*, 224 U. S. 547. But in that case there was no offer to amend by joining or substituting the personal representative, and this court, while reversing the judgment, did so without prejudice to such rights as the personal representatives might have. The decision left untouched the question of the

propriety of such an amendment as was applied for and allowed in the case before us; an amendment that, without in any way modifying or enlarging the facts upon which the action was based, in effect merely indicated the capacity in which the plaintiff was to prosecute the action. The amendment was clearly within sec. 954, Rev. Stat. Nor do we think it was equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by sec. 6 of the Employers' Liability Act. The change was in form rather than in substance. *Stewart v. Baltimore & Ohio Railroad Co.*, 168 U. S. 445. It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefore it related back to the beginning of the suit." Following the decision of the Supreme Court in the *Wulf* case, many state courts have decided that an amendment after the two year period of limitation, permitting a plaintiff suing in her individual capacity to sue as an administratrix, introduced no new cause of action.<sup>67</sup> A New York court held, contrary to the decisions cited in the preceding paragraph, that a complaint under a state law may be amended more than two years after the injury by adding an allegation that plaintiff was employed in interstate commerce at the time of the accident.<sup>68</sup> In the original complaint in the *Kinney* case, there was no allegation of interstate employment and no reference to the federal act. The court held that the amendment was permissible as the cause of action was the same in the original and the amended complaints.

67. *Texarkana & Ft. S. Ry. Co. v. Casey*, — Tex. Civ. App. —, 172 S. W. 729; *St. Louis, S. F. & T. Ry. Co. v. Smith*, — Tex. Civ. App. —, 171 S. W. 512.

68. *Kinney v. Hudson River R. Co.*, 98 N. Y. Misc. 11, 162 N. Y. Supp. 42.

The supreme court of Mississippi held that a petition stating a cause of action under a state

law may be amended after the two-period of limitation by adding allegations of interstate employment so as to bring the action within the federal act. Such an amendment, it was decided, did not constitute a new cause of action barring the suit. *Broom v. Southern Ry. Co.* in *Mississippi*, 115 Miss. 493, 76 So. 525.

## CHAPTER XXXVII.

### EVIDENCE UNDER THE LIABILITY ACT.

- Sec. 698. Rules of Evidence Governed by State Law.
- Sec. 699. Law of Forum Determines Whether Widow or Other Beneficiaries may Testify.
- Sec. 700. State Law not Applicable in Passing on Demurrer to the Evidence.
- Sec. 701. Record Evidence of Interstate Shipments—Statutory Provision and Order of Interstate Commerce Commission.
- Sec. 702. Method of Proving When Train and Switching Crews are Engaged in Interstate Commerce.
- Sec. 703. Method of Proving When Other Railroad Employees are Engaged in Interstate Commerce.
- Sec. 704. Evidence Held Sufficient to Show that Train was Carrying Interstate Commerce.
- Sec. 705. Evidence Held not Sufficient to Show that Train was Carrying Interstate Commerce.

#### § 698. Rules of Evidence Governed by State Law.

In all actions against common carriers by railroad under the Federal Employers' Liability Act, prosecuted in state courts, the rules of evidence enforced in the federal courts, do not control, for the reason that the law of procedure is always governed by the law of the forum. The supreme court of Arkansas, in the case cited in the notes, stated the rule as follows: "It is a well-established rule that, in actions in a state court to enforce rights given by a federal statute, the rules of evidence of the state court must control unless otherwise provided by the federal law."<sup>1</sup>

§ 699. Law of Forum Determines Whether Widow or Other Beneficiaries May Testify. Whether a widow or other beneficiary named in either one of the three classes under the federal statute, may testify in an action brought by an administrator in their behalf, is to be determined by the law of the state where the action is pending. Applying this rule, the Supreme Court of

1. Kansas City Southern R. Co. v. Leslie, 112 Ark. 305, Ann. Cas. 1915B 834, 167 S. W. 83.

North Carolina held that a mother of a deceased employe, killed while employed in interstate commerce, was a competent witness in an action brought under the federal act by an administrator, for his death.<sup>2</sup>

**§ 700. State Law Not Applicable in Passing on Demurrer to the Evidence.** In all actions prosecuted under the federal act in state courts, the question whether there has been sufficient evidence introduced to justify the trial court in submitting the case to the jury is not to be determined by the laws of the state nor the decisions of its courts, but by the controlling decisions of the national courts, as such a question is not one of procedure but one which involves the substantive rights of the parties.<sup>3</sup>

**§ 701. Record Evidence of Interstate Shipments—Statutory Provision and Order of Interstate Commerce Commission.** The Act of Congress regulating interstate commerce empowers the Interstate Commerce Commission to prescribe the forms of all "accountings, records and memoranda of the movement of traffic" made by common carriers engaged in interstate commerce.\* The statute also provides that any carrier "who shall wilfully neglect or fail to make full, true and correct entries in such accountings, records or memoranda of all facts and transactions appertaining to the carrier's business" shall be deemed guilty of a crime. It is further provided in the statute that the Interstate Commerce Commission may issue orders specifying such operating records, books, blanks, tickets, stubs or documents of carriers which may, after a reasonable time, be destroyed, and prescribe the length of time such books, papers or documents shall be preserved. Pursuant to the authority given in this statute, the Interstate Commerce Commission has issued and formu-

2. *Irvin v. Southern R. Co.*, L. Ed. 1179, 33 Sup. Ct. 858.  
164 N. C. 5, 80 S. E. 78.

3. *St. Louis, I. M. & S. Ry. Co. v. McWhirter*, 229 U. S. 265, 57  
4. Act June 29, 1906, c. 3591,  
sec. 7, 34 Stat. 593; Act. Feb. 25,  
1909, c. 193, 35 Stat. 649.



lated a general order regulating the destruction of all records on steam roads.<sup>5</sup>

**§ 702. Method of Proving When Train and Switching Crews are Engaged in Interstate Commerce.** Since train and switching crews are not engaged in interstate commerce unless there are interstate shipments in the train or in the "drags" in switching yards upon which they are employed, plaintiffs in actions under the federal act must therefore produce evidence showing such employment. When oral proof of interstate employment of train and switching crews is not available, plaintiff must produce some record showing that there were interstate shipments in the train.<sup>6</sup> All railroad companies keep and maintain a multitude of records concerning the transportation of all freight and passengers. They are required by law to be faithfully and accurately kept and most of them must be preserved for six years under the order of the Interstate Commerce Commission. Relating to the transportation of freight and passengers, the records usually kept are the dispatcher's train sheets records of hours of service, conductor's train and car reports, commonly known as wheel reports, freight waybills, bills of lading and ticket and baggage records. Most of these records are kept in the office of the superintendent at division points. The records of the dispatchers are commonly known as train sheets in which are kept a daily record showing the movement of all trains over the division, time of departure and arrival at each station, number of train, names of engineer and

5. Order regulating destruction of records of steam roads in accordance with sec. 20 of the Act to regulate commerce issued on the first day of June, 1914, and effective on the first day of July, 1914, superseding and cancelling orders dated June 10, 1910, June 8, 1911, and October 7, 1912.

6. Notwithstanding a railroad company keeps records showing

the origin and destination of every loaded or empty car in a train, yet it is competent for a conductor to testify orally that some of the cars in the train were destined to points beyond the state. *Wagner v. Chicago, R. I. & P. R. Co.*, 277 Ill. 114, 115 N. E. 201; *Devine v. Chicago, R. I. & P. R. Co.*, 266 Ill. 248, Ann. Cas. 1916B 481, 107 N. E. 595.

conductor with number of cars in the train. Registers are also kept in which entries are made by all train employes showing number of hours the employes were on duty. These registers show the train upon which the employe worked, the number of cars on the train, whether loaded or empty, and between what points the train was operated. On all trips between terminals conductors are generally required to make out and deliver at destination points wheel reports which show the date the trains moved, the number of the trains, the initials and number of cars, the initial and destination point on each car over the division and the mileage of the cars and train. These wheel reports are required to be kept for three years if transcribed into other records and if not so transcribed, for six years. Every common carrier engaged in interstate commerce is also required to issue a receipt or bill of lading for all shipments. The originals of these contracts are usually delivered to the shipper and duplicate copies are retained by the carrier. In addition to these bills of lading the carrier makes out for each shipment a waybill, which waybill accompanies the car from point of origin to point of destination and is handled successively by the conductors of the trains in which the shipment is carried and usually by foreman of the switching crews at terminal points. Carbon copies of all such waybills are kept at the point of origin. There are three classes of waybills, local waybills, that is, where the shipment is between two points on the same line, interline waybills where cars are transported by more than one carrier, and company freight waybills which denote that merchandise carried belongs to the railroad company. In addition to these there are baggage records showing the initial and destination points of all baggage shipped. These are required to be retained for a period of three years. All these records may be obtained by subpoena *duces tecum* served upon the officers of the company in charge of the records called for in the subpoena.

**§ 703. Method of Proving When Other Railroad Employes are Engaged in Interstate Commerce.** Proof that the line upon which they are working is used by the railroad company indiscriminately in moving both interstate and intrastate commerce, is sufficient to show that such employes as linemen, signalmen, bridge carpenters, section men and similar employes are employed in interstate commerce. In the same way, in order to prove that car repairers and engine repairers working in terminal yards are engaged in interstate commerce, it must be shown that the car or the engine upon which they were at work when injured, was used exclusively in interstate or foreign commerce.<sup>7</sup>

**§ 704. Evidence Held Sufficient to Show That Train was Carrying Interstate Commerce.** In an action under the federal act the plaintiff testified that he was an engineer and had been hauling certain passenger trains, calling them by number, for several years, one running east and the other west. He spoke of them as through passenger trains. Another witness testified that the plaintiff was an engineer for the defendant, running on the "Black Hills Division;" such division, he said, being west of Long Pine, with headquarters at Chadron. The action was being prosecuted in the state courts of Nebraska and the question was presented to the court whether this evidence was sufficient to show that the plaintiff was an engineer on an interstate train. The court said: "While the evidence of the interstate character of trains, three and six, is not as clear and satisfactory as it could and should have been made, we think it was sufficient to take the case to the jury on that point. . . . We take judicial notice of the fact that the Black Hills are in South Dakota. We think we may also take judicial notice of the fact, well known to every citizen of even ordinary intelligence in the State of Nebraska, that the west terminus of defendant's road, which runs through Long Pine is in the Black Hills. With these facts

7. Section 488, *supra*.

established, and the further fact established by the evidence that Long Pines is the division point on the Black Hills division, of which Chadron is the headquarters, the testimony of plaintiff that trains three and six were through trains, meant that they were trains running through the Black Hills Division, which would be from Long Pine to the Black Hills. Being such trains, they were interstate trains, engaged in interstate business.'"<sup>8</sup> In an action prosecuted in the state courts of Texas for the death of an engineer who was killed while operating a train between two points in the State of Arizona, the plaintiff introduced testimony that the train on which the deceased was an engineer, consisted of fifty cars, most of them being loaded with oil and lumber; that the defendant's line ran from California through Arizona and New Mexico; and most of the lumber and oil shipped by the defendant from the west came from California. In connection with this testimony, one of defendant's officers testified that if fifty cars were going east on the track where the engineer was killed, it was quite likely that the greater portion of them came from California. The court held that the evidence was sufficient to submit the case to the jury as to whether the decedent was engaged in interstate commerce at the time of the accident.<sup>9</sup>

**§ 705. Evidence Held Not Sufficient to Show That Train was Carrying Interstate Commerce. Testimony**

8. *Bower v. Chicago & N. W. R. Co.*, 96 Neb. 419, 148 N. W. 145.

9. *Southern Pac. Co. v. Vaughn*, — Tex. Civ. App. —, 7 N. C. C. A. 622, 165 S. W. 885.

A switching foreman was employed in making up a train in a railroad yard at Oelwein, Ia. The train was destined to a point in Minnesota and some of the cars were to be set out at stations in Iowa. Some of the cars destined for points in Iowa originated in Iowa and some came from

points in Illinois. Some of the cars destined to Minnesota originated in Iowa and some came from Illinois. All these cars, both intrastate and interstate, were being switched into the train at the time the foreman was killed while engaged in such work. The court held that these facts were sufficient to show that the foreman was engaged in interstate commerce as a matter of law. *Crandall v. Chicago Great Western R. Co.*, 127 Minn. 498, 150 N. W. 165.

in an employe's action against a common carrier by railroad under the federal statute, who was injured while on a train running between two points in the same state, that it was customary for train men to mark on cars the number or the name of the station to which they were destined, that one of the cars had marked on it with chalk the name of a town in an adjoining state on the defendant's line of railway was not sufficient to show that the car was being moved from a point in one state to a point in another.<sup>10</sup> Discussing the sufficiency of such evidence, the court, in the case cited in the notes, said: "But, assuming that at some time not shown and, by some person unknown, these words were upon the car in question, it could hardly be said that the natural, fair and reasonable inference to be drawn therefrom is that at the time in question this car was actually in process of transportation to a point in another state, and especially so when this was made the vital and determining question in the case." Evidence that an employe was a watchman on an engine pulling a train between two points in the same state, was held not to be sufficient to show that the watchman, while so engaged, was employed in interstate commerce, as the court will not take judicial notice that a railroad is engaged in interstate commerce.<sup>11</sup> In the case cited the court said: "While this court may properly, in certain cases, take judicial notice of the fact that anyone of the many great trunk lines of railway extending through the various states is engaged in interstate commerce, yet the fact is equally as notorious and as much the subject of judicial notices that every such railway is also engaged in intrastate traffic: and clearly it is not a matter of such general knowledge as to dispense with proof that any specific portion of the equipment or any particular employe of such railway is engaged in interstate, rather than intrastate commerce at any precise time or place. The only evidence in this case as to the character of

10. *Barker v. Kansas City, M. & O. R. Co.*, 88 Kan. 767, 43 L. R. A. (N. S.) 1121, 129 Pac. 1151.

11. *Chicago, R. I. & P. R. Co. v. McBee*, 45 Okla. 192, 145 Pac. 331.

commerce in which defendant and deceased were engaged, is that the engine which was being watched by, and exploded and caused the death of, the said John M. McBee was used in hauling a passenger train between points in this state." That the duties of a brakeman working for a common carrier by railroad generally consisted in assisting in the movement of cars containing both intrastate and interstate commerce, is not sufficient to create a jury issue on the question as to whether he was employed in interstate commerce, while assisting in shifting cars at the time of the accident, the evidence being silent as to the character of freight with which the cars on which he was working at the time of the accident, were loaded, what disposition had been made of the cars after their arrival and what kind of shipment, if any, they contained, and their destination.<sup>12</sup> Testimony that a train running between Hammond, Ind., and Crown Point, Ind., probably had cars originating at Chicago, Ill., was not sufficient to show that the cars on the train were used in interstate commerce.<sup>13</sup>

12. *Hench v. Pennsylvania R. Co.*, 246 Pa. 1, L. R. A. 1915D 557, Ann. Cas. 1916D 230, 91 Atl. 1056. Accord: *Chicago & E. R. Co. v.*

*Feightner*, — Ind. App. —, 114 N. E. 659.

13. *Chicago & E. R. Co. v.*

*Feightner*, — Ind. App. —, 114 N. E. 659.

## CHAPTER XXXVIII.

### MATTERS OF PRACTICE UNDER LIABILITY ACT.

- Sec. 706. At What Stage of Proceedings, Motion to Elect Should be Sustained—Practical Considerations.
- Sec. 707. Motions to Elect under Iowa Statute in Actions under Federal Act.
- Sec. 708. Instances Where Motion to Elect Should have been Sustained before Trial.
- Sec. 709. Widow Suing in her Own Name in One Suit and as Administratrix in Another, Cannot be Compelled to Elect.
- Sec. 710. Verdicts by Less Than Twelve Jurors, When Permissible under State Law, Valid in Actions under Federal Statute.
- Sec. 711. Commencement of Action under State Law no Bar to Subsequent Suit under Federal Act.
- Sec. 712. When Suit under State Law is Res Adjudicata.
- Sec. 713. Errors in Actions under Federal Act Held Harmless on Appeal.
- Sec. 714. Practice of Granting Partial new Trials in Actions under Federal Act Proper, When.
- Sec. 715. Power of State Courts under Federal Act to Direct Entry of Judgment Notwithstanding Verdict.
- Sec. 716. Power of Administrators to Settle Claims under Federal Act Without Consent of Court.
- Sec. 717. State Laws Adding Penalties to Judgment when Affirmed on Appeal Applicable under Federal Act.
- Sec. 718. Plaintiff in Action under Federal Act may Sue as a Poor Person in United States Courts, When.

### § 706. At What Stage of Proceedings, Motion to Elect Should be Sustained.—Practical Considerations.

When the plaintiff pleads a cause of action under the state law in one count and under the federal law in another count, whether a motion to elect should be sustained before the trial, or at the close of the plaintiff's evidence, or upon the conclusion of all the evidence introduced, or should be denied altogether, presents some questions of difficulty to trial courts. Counsel representing railroads have often insisted with some show of reason that since the plaintiff has alleged facts in his petition showing the federal act applicable, the remedy therein provided is exclusive and therefore a motion to elect should be sustained before proceeding to

trial. Another reason advanced for such action by trial courts is, that the defenses under the two laws are sometimes quite dissimilar so that if compelled to go to trial under both counts, a hardship will result. But, on the other hand, as the plaintiff is permitted to plead the two laws alternatively he ought to be permitted to have some of the practical benefits resulting from such a rule.<sup>1</sup> To force him to elect before the trial, would practically be of no benefit to him as the main purpose of stating a case alternatively is to have a pleading to fit the proof, whatever it might be. Sometimes the true facts as to such matters are not in the possession of the plaintiff while the defendant has the absolute means of knowing whether a train, for instance, has intrastate shipment or interstate shipments. It may be that under all the facts after the evidence is in, it is a doubtful question as to what kind of commerce the plaintiff was employed in, that is, the facts may be such that different conclusions may be drawn therefrom by reasonable men. For instance, a question of fact might arise as to whether a train or a "drag" on which an employe was working, contained interstate shipments, some witnesses denying and others affirming that to be true. In such a contingency the question whether the plaintiff was engaged in interstate or intrastate commerce is not a question of law for the court but a question of fact to be submitted to the jury under proper instructions<sup>2</sup> and

1. *Hubert v. New York, N. H. & H. R. Co.*, 90 Conn. 261, 96 Atl. 967.

2. *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A. 109; *Ann. Cas.* 1914C 159; *Atkinson v. Bullard*, 14 Ga. App. 69, 80 S. E. 220; *Southern Pac. Co. v. Vaughn*, — Tex. Civ. App. —, 7 N. C. C. A. 622, 165 S. W. 885.

"As already indicated, the fact that plaintiff was employed in

interstate commerce was established. Such a question is usually a mixed question of law and fact, and often one more of law than of fact. The facts involved in such a question are usually simple. When they appear in the record without material dispute, it devolves upon the court to construe the federal act in its application thereto. So in this case sufficient facts are undisputed to bring the case within the federal act. The jury, therefore, had nothing to do with the question. The



it would be an injustice to the plaintiff to require him to elect on which cause of action he would submit his case, even at the close of all the evidence. On the other hand, it may be that the facts stated in the petition as to such employment, are such that the court can determine the question as a matter of law or if at the close of the plaintiff's evidence, or at the close of all the evidence in the case, it appears as a matter of law that the plaintiff was employed in either one or the other kind of commerce, the trial court should then sustain a motion to elect if presented. No hard and fast rule can be laid down as to when a motion to elect should be sustained. Trial courts should take into consideration the rights and difficulties of both parties, and rule, without unnecessarily placing either party at a disadvantage in enforcing or protecting his rights.

**§ 707. Motions to Elect Under Iowa Statute in Actions Under Federal Act.** The question as to when a motion to elect should be sustained, is a question of practice under the rules of the courts of the states where the case is pending. As to matters of procedure under the federal act, the decisions of the national courts do not control but the question is a matter governed by state law.<sup>3</sup> A statute of the state of Iowa provides (sec. 3545, Iowa Code, 1897): "Causes of action of whatever kind, where each may be prosecuted by the same kind of proceedings, if held by the same party, and against the same party, in the same right, and if action on all may be bought and tried in that county, may be joined in the same petition; but the court may direct all or any portion of the issues joined to be tried separately, and may determine the order thereof." In an action pending in a federal district court in the state of Iowa, the

court could properly have given a peremptory instruction thereon." *Pelton v. Illinois Cent. R. Co.*, 171 Iowa 91, 150 N. W. 236.

3. *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. Ed. 1226, 34 Sup. Ct. 729, 6 N. C. C. A. 224; *Southern*

*Ry.—California Division v. Bunnett* 233 U. S. 80, 58 L. Ed. 860, 34 Sup. Ct. 566, 10 N. C. C. A. 853; *McAdow v. Kansas City Western R. Co.*, 192 Mo. App. 540, 164 S. W. 188.

defendant, after the plaintiff had pleaded a cause of action under the state law in one count and under the federal act in another count, filed before trial the motion requiring the plaintiff to elect upon which cause of action he would proceed to trial.<sup>4</sup> The court held that under the statute mentioned, a plaintiff who alleges a cause of action under the state law in one count and under the federal act in another count may, if the evidence is doubtful, submit both to the jury and may recover under whichever statute appears from the evidence to be applicable. In passing upon the motion, Judge Reed said: "It may be that at the time of filing her petition she knows the acts of negligence upon which she relies for recovery; but whether they authorize a recovery under the Employers' Liability Act of Congress, or the general law of negligence, she may not then be able to determine; and the facts may be of such a character that they would have to be submitted to the jury to determine whether the injury to the deceased occurred while he was engaged in interstate commerce, or while he was not so engaged. It may be that at the close of the testimony it will clearly appear that he was or was not engaged in interstate commerce, and that the court may then determine the question as one of law, or they may be such as to require the submission of the question to the jury to determine that question. If the defendant through its own neglect or some of its employes has inflicted an injury upon the deceased which caused his death, and it is legally liable therefor, whether that injury was inflicted while the decedent was engaged in interstate commerce, or while he was not so engaged, the defendant should respond therefor; but, of course, it can be required to respond but once, and whether or not the recovery shall be under the Employers' Liability Act of Congress for the benefit of the

4. *Bankson v. Illinois Cent. R. Co.*, 196 Fed. 171.

Where an employe brought a suit under the state law, and later under the federal statute because

of doubt as to which afforded him a remedy, the cases should be consolidated for one trial. *Tinkham v. Boston & M. R. R.*, 77 N. H. 11, 88 Atl. 709.

dependent relatives of the deceased, if there are any, or shall be for the benefit of his estate, the defendant is not particularly interested, except as this may bear on the amount of the recovery.”

**§ 708. Instances Where Motion to Elect Should Have Been Sustained Before Trial.** If a state law differs radically from the federal statute as to certain defenses, the plaintiff may be required to elect upon which cause of action he will proceed to trial. Where under a state statute, a prima facie case of negligence on the part of the employer was made out, when any defect or unsafe condition was shown, while under the federal act the plaintiff must show negligence under the ordinary rules applicable, if the petition states a cause of action under the two laws in separate counts, a motion to elect, if presented before the trial, should be then sustained.<sup>5</sup> In another action for the death of a brakeman, it was alleged in the petition, that the decedent was engaged in interstate commerce or intrastate commerce, the plaintiff did not know which. The deceased was killed, it was alleged, as the direct result of one or more of the acts of negligence charged in the petition. The court held that the petition was not sustainable under a state statute authorizing alternative allegations, since the rights and liabilities of the parties under the state law and the federal act are essentially different, and hence the defendant was entitled to compel the plaintiff to elect on which cause of action she would proceed.<sup>6</sup> In another case, in which the injured servant alleged a cause of action under the state law in one count and under the federal act in another, it was held that the motion to elect should have been sustained, but that the improper denial of the defendant's motion

5. Cincinnati, N. O. & T. P. R. Co. v. Finan's Adm'x, 153 Ky. R. Co. v. Clark, 169 Ky. 662, 185 S. W. 94; Thompson v. Cincinnati, N. O. & T. P. R. Co., 165 Ky. 256, Ann. Cas. 1917A 1266, 176 S. W. 1006; South Covington & C. St. R. Co. v. Finan's Adm'x, 153 Ky. 340, 155 S. W. 742.  
6. Louisville & N. R. Co. v. Strange's Adm'x, 156 Ky. 439, 161 S. W. 239.

to compel an election was harmless, where the court ruled at the close of all the evidence that the case did not come within the federal act.<sup>7</sup> In so holding that the error was harmless the court said in that case: "But this error (failing to sustain motion to elect before trial) was not in this case prejudicial to the railroad company and in cases like this the failure to require the plaintiff to elect will not be reversible error unless it appears that the substantial rights of the defendant were prejudiced by the ruling of the court. In the *Strange* case, we pointed out the difference between the federal act and the common law and the reason why it was prejudicial error in that case not to have sustained a motion to elect, but the reasons that made it prejudicial not to sustain the motion in that case do not appear in this one." Plaintiff, a widow of an employe killed in Missouri, brought suit in an Iowa state court, basing her cause of action upon the Missouri law which provides that in case of death, the widow may recover without the appointment of an administrator. Defendant then filed an answer alleging that the cause of action was governed by the federal act. Later, the plaintiff as administratrix of the estate of her husband, filed a new suit under the federal act and the defendant's answer in that case was a general denial. On motion the two causes were consolidated and tried together. It does not appear from the report of the case whether the consolidation of the two actions, in which the widow was plaintiff in one suit in her individual capacity and plaintiff in the other suit as administratrix, were consolidated by consent. At the close of plaintiff's evidence a motion to require plaintiff to elect which cause of action she would prosecute, was overruled, but at the close of the evidence, the court on defendant's motion required the plaintiff to elect and she chose to proceed with the action under the state law. The appellate court held that under the facts the cause of

7. *Cincinnati, N. O. & T. P. R. Co. v. Clarke*, 169 Ky. 662, 185 S. W. 94; *Louisville & N. R. Co. v. Moore*, 156 Ky. 708, 161 S. W. 1129.

action was governed by the federal statute and ordered the cause reversed for that reason for a new trial.<sup>8</sup>

**§ 709. Widow Suing in Her Own Name in One Suit and as Administratrix in Another, Cannot be Compelled to Elect.** Although a widow brings one suit in her own name against a railroad company for the death of her husband under the laws of the state, and subsequently brings another action as administratrix under the federal act, the bringing of the action under the federal act does not have the effect of superseding the action under the state law, so as to deprive the court of jurisdiction to hear the action under the state law, during the pendency of the suit under the federal act. In jurisdictions where the state statute permits such suits to be consolidated, tried and prosecuted together, if there is an issue of fact, not of law, as to whether the deceased was engaged in intrastate or interstate commerce, no election will be compelled even at the close of the evidence, but of course there can only be a recovery under one law, as the jury may find the facts to be, relative to employment at the time of the injury.<sup>9</sup> The Supreme Judicial Court of Massachusetts expressly disapproved the reasoning in the Kentucky cases cited in the foregoing paragraph and held that a widow should not be compelled to elect, although suing under the state law in one suit and as administratrix under the federal law in another. The argument of the court in this case is so forceful, clear and concise that it would detract from its strength and beauty for a commentator to attempt to condense it and it is reproduced: "But we are of opinion that the ruling was wrong. The federal act in the field covered by it, supersedes all state statutes. As to matters within the scope of the federal power, legislation by Congress is supreme. So long as Congress had not acted as to liability for injuries received by employes of railroads while engaged in interstate commerce,

8. *Armbruster v. Chicago, R. I. & P. R. Co.*, 166 Iowa 155, 147 N. W. 337.

9. *Corbett v. Boston & M. R. R.*, 219 Mass. 351, 9 N. C. C. A. 691 107 N. E. 60.

legislation by the states touching that subject, being within the police power, was valid. But when Congress exerted its jurisdiction to regulate in this respect commerce between the states, state statutes previously operative in that sphere yielded to its paramount and exclusive power. (citing cases.) The federal act has no greater extent. It does not undertake to affect the force of the state statute in its appropriate sphere. The state law is as supreme and exclusive in its application to intrastate commerce as is the federal law to interstate commerce. If the employe of a railroad engaged in both interstate and intrastate commerce is injured or killed while in the former service, the carrier's liability is controlled and must be determined solely by the federal law; if in the latter service, such liability rests wholly upon the state law (citing case). The facts and not the pleadings determine whether the wrong done in any given case gives a right to recover under the federal or the state statute. The allegations in the plaintiff's declarations in these two actions do not constitute the test whether the jurisdiction of the court is under the federal or state statute. These simply are the basis for a judicial inquiry into the facts which alone can determine that question. It is a familiar principle that, where inconsistent courses are open to an injured party and it is doubtful which ultimately may lead to full relief, he may follow one even to defeat, and then take another, or he may pursue all concurrently, until it finally is decided which affords the remedy. The assertion of one claim which turns out to be unsound so long as it goes no further, is simply a mistake. It is not and does not purport to be a final choice, nor an election. A party is not obliged to select his procedure at his peril (citing cases). This rule has been followed frequently in actions where it was doubtful whether the remedy of the plaintiff was under our Employers' Liability Act or at common law (citing cases). It is equally applicable to the cases at bar. The principle is not changed in any material respect, because the question relates to remedies afforded by the statutes

of different sovereign powers, each exclusive within its own domain. The relief is sought in the same forum, for the state court has jurisdiction of the cause of action, whichever statute may be controlling (citing cases). There are strong practical considerations in the administration of justice which lead to the same result. It oftentimes would be a great hardship upon the parties to compel them to try out first the question whether the federal act applies, and, if it in the end shall be decided that it does not, then to test by further litigation their rights under the state statute. The short period of limitations provided in each act often might expire before a final decision could be reached. If adverse to the plaintiff on the ground of error in the form of relief sought, he thus might be barred from a just recovery. Although both the federal and state statutes as to amendments are liberal (Rev. St. U. S. sec. 954; R. L. c. 173, sec. 48) and are liberally interpreted in cases of this sort (*Missouri, Kansas & Texas Ry. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355 [6 N. C. C. A. 230n, 237n], *Ann. Cas. 1914B 134*; *Herlihy v. Little*, 200 Mass. 284, 86 N. E. 294), nevertheless the allowance of such amendments rests commonly in the sound discretion of the trial judge and is not subject to revision on exceptions. As it is not a matter of right, substantial interests might be lost through no fault of a plaintiff who constantly had been alert in his own behalf. The federal act has been construed as covering injuries occurring at the moment when the particular service performed is a part of interstate commerce. *Illinois Central R. R. v. Behrens*, 233 U. S. 473, 478, 34 Sup. Ct. 646, 58 L. Ed. 1051 (6 N. C. C. A. 189n), *Ann. Cas. 1914C 163*. Whether a railroad employe is engaged in interstate or intrastate commerce often involves legal discrimination of great nicety about which even the justices of the highest court are not always in harmony (citing cases). It would be a saving of expense both to the parties and to the commonwealth if the two actions could be prosecuted together, so that by one trial the facts could be ascertained and the

cause ended by the determination of the governing principles of law. Where the settlement of an issue of fact depends upon conflicting evidence, it seems more likely that the truth will be ascertained by adducing all the evidence at one time before a single tribunal and enabling it to find out the real situation under an adequate statement of the governing rules of law applicable to all phases, than to require two distinct and successive inquiries before separate tribunals where only a single aspect of the incident could be open to investigation at one time. There are important points of dissimilarity between the rights conferred and the burdens imposed under the two statutes. The rules of evidence may be different. The principles of law by which liability may be established under the two statutes are somewhat divergent. Difficulties will be presented in the trial which will require great care and a strong grasp by the presiding judge, and demand careful discrimination by jurors. But these are not insurmountable obstacles, nor do they appear to counterbalance the advantages which will accrue in permitting a conjoint prosecution of the two causes in appropriate instances.<sup>10</sup>

**§ 710. Verdicts by Less Than Twelve Jurors, When Permissible under State Law, Valid in Actions under Federal Statutes.** Section 6 of the Federal Employers' Liability Act (one of the 1910 amendments) provides that the jurisdiction of courts of the United States under this act shall be concurrent to that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.<sup>11</sup> The seventh amendment to the Constitution of the United States provides: "In suits at common law, where the value in controversy shall exceed twenty

10. *Corbett v. Boston & M. R. R.*, 219 Mass. 351, 9 N. C. C. A. 691, 107 N. E. 60.

11. Act April 22, 1908, c. 149,

sec. 6, 35 Stat. 66, as amended by Act April 5, 1910, C. 143, sec. 1, 36 Stat. 291, Fed. Stat. Ann. 1912 Supp. P. 335.



dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." Construing this provision of the Constitution, the courts have uniformly held that the jury trial contemplated by this section is the right to a trial by a jury of twelve men, whose findings shall be unanimous.<sup>12</sup> It has, however, been held without dissent, that this seventh amendment does not apply to the states, and that a state is not prohibited by the federal Constitution from providing for a jury of less than twelve men or for a verdict that is not unanimous.<sup>13</sup> Nor is a trial under a state statute dispensing with the feature of unanimity or abridging the number of jurors, a denial of "due process" within the meaning of the fourteenth amendment to the Constitution of the United States.<sup>14</sup> The constitutions and the statutes of several of the states provide that in civil cases, a verdict may be returned by less than twelve men or by three-fourths or five-sixths of the jurors concurring in the verdict. It has been urged that in actions prosecuted in the state courts under the Federal Employers' Liability Act the provision of the Constitution of the United States requiring a unanimous verdict by twelve men applies in state courts for the reason that the action is under an Act of Congress. The courts have unanimously held that the verdict in such cases is not controlled by the provision of the national Constitution but by the

12. *Rassmussen v. United States*, 197 U. S. 516, 49 L. Ed. 862, 25 Sup. Ct. 514; *Black v. Jackson*, 177 U. S. 349, 44 L. Ed. 801, 20 Sup. Ct. 648; *Thompson v. State*, 170 U. S. 343, 42 L. Ed. 1061, 18 Sup. Ct. 620; *American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. Ed. 1079, 17 Sup. Ct. 618.

13. *Maxwell v. Dow*, 176 U. S. 581, 44 L. Ed. 597, 20 Sup. Ct. 448, 494; *Walker v. Sauvinet*, 92 U. S.

90, 23 L. Ed. 678; *Edwards v. Elliott*, 21 Wall. (U. S.) 532, 22 L. Ed. 487; *Twitchell v. Com.*, 7 Wall. (U. S.) 321, 19 L. Ed. 223; *Barron v. Baltimore*, 7 Pet. (U. S.) 243, 8 L. Ed. 672.

14. *Hurtado v. People*, 110 U. S. 516, 28 L. Ed. 232, 4 Sup. Ct. 111, 292; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Kennard v. Louisiana ex rel. Morgan*, 92 U. S. 480, 23 L. Ed. 478.

laws of the state where the suit is pending.<sup>15</sup> The fact that the suit is under a federal statute makes no difference, for the reason, as to all matters of procedure, the state law is controlling.<sup>16</sup> In the *Bombolis* case, cited, wherein the federal Supreme Court held that the seventh amendment did not apply to actions under the Federal Employers' Liability Act prosecuted in state courts, Mr. Chief Justice White said: "Two propositions as to the operation and effect of the Seventh Amendment are as conclusively determined as is that concerning the nature and character of the jury required by that Amendment where applicable. (a) That the first ten Amendments, including of course the Seventh, are not concerned with state action and deal only with Federal action. We select from a multitude of cases those which we deem to be leading. *Barron v. Baltimore*, 7 Pet. 243; *Fox v. Ohio*, 5 How. 410, 434; *Twitchell v. Commonwealth*, 7 Wall. 321; *Brown v. New Jersey*, 175 U. S. 172, 174; *Twining v. New Jersey*, 211 U. S. 78, 93. And, as a necessary corollary, (b) that the Seventh Amendment applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts or the standards which must be applied concerning the same. *Livingston v. Moore*, 7 Pet. 469, 552; *The Justices v. Murray*, 9 Wall. 274; *Edwards v. Elliott*, 21 Wall. 532; *Walker v. Sauvinet*, 92 U. S. 90; *Pearson v. Yewdall*, 95 U. S. 294. So completely and conclusively have both of these principles been settled, so expressly have they been recognized without

15. *Chesapeake & O. R. Co. v. Carnahan*, 241 U. S. 241, 60 L. Ed. 979, 36 Sup. Ct. 594; *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U. S. 211, 60 L. Ed. 961, 36 Sup. Ct. 595, L. R. A. 1917A 86, Ann. Cas. 1916E 505; *Louisville & N. R. Co. v. Thomas' Adm'r*, 170 Ky. 145, 185 S. W. 840; *Chesapeake & O. R. Co. v. Shaw*, 168 Ky. 537, 182 S. W. 653; *Louisville & N. R. Co. v. Holloway's Adm'r*, 168 Ky. 262,

181 S. W. 1126; *Chesapeake & O. R. Co. v. Kelly's Adm'r*, 161 Ky. 655, 171 S. W. 185; *Cramer v. Chicago, M. & St. P. R. Co.*, 134 Minn. 61, 158 N. W. 796; *Donaldson v. Great Northern R. Co.*, 89 Wash. 161, 154 Pac. 133.

16. *Gibson v. Bellingham & N. Ry. Co.*, 213 Fed. 488; *Chesapeake & O. R. Co. v. Kelly's Adm'r*, 161 Ky. 655, 171 S. W. 185.

dissent or question almost from the beginning in the accepted interpretation of the Constitution, in the enactment of laws by Congress and proceedings in the Federal courts and by state constitutions and state enactments and proceedings in the state courts, that it is true to say that to concede that they are open to contention would be to grant that nothing whatever had been settled as to the power of state and Federal governments or the authority of state and Federal courts and their mode of procedure from the beginning. Doubtless it was this view of the contention which led the Supreme Court of Minnesota in this case and the courts of last resort of other States in the cases which were argued with this to coincide in opinion as to the entire want of foundation for the proposition relied upon, and in the conclusions that to advance it was virtually to attempt to question the entire course of judicial ruling and legislative practice both state and National which had prevailed from the commencement. And it was of course presumably an appreciation of the principles so thoroughly settled which caused Congress in the enactment of the Employers' Liability Act to clearly contemplate the existence of a concurrent power and duty of both Federal and state courts to administer the rights conferred by the statute in accordance with the modes of procedure prevailing in such courts. Indeed, it may not be doubted that it must have been the same point of view which has caused it to come to pass that during the number of years which have elapsed since the enactment of the Employers' Liability Act and the Safety Appliance Act and in the large number of cases which have been tried in state courts growing out of the rights conferred by those acts, the judgments in many of such cases having been here reviewed, it never entered the mind of anyone to suggest the new and strange view concerning the significance and operation of the Seventh Amendment which was urged in this case and the cases which were argued with it."

§ 711. **Commencement of Action under State Law no Bar to Subsequent Suit under Federal Act.** When a party has two alternative and inconsistent rights arising from the same facts, an election to pursue one of those remedies bars a subsequent prosecution of the inconsistent remedial right.<sup>17</sup> But the fact that a party wrongfully supposes that he has two such rights, and attempts to chose the one to which he is not entitled, is not enough to prevent his exercising the other, if he is entitled to it.<sup>18</sup> As the Federal Employers' Liability Act supersedes all state legislation covering the same field, an employe injured in such commerce has, therefore, but one right of action and but one remedy. He is not, therefore, by bringing and discontinuing an action at common law or under a state statute, barred by the doctrine of election of remedies from subsequently bringing his action under the federal statute.<sup>19</sup> "It is urged with much emphasis that the administratrix was estopped from asserting her claim before the Industrial Board because she elected her remedy under the Federal Employers' Liability Act. The election of remedies has no application whatever to this suit. The doctrine of the election of remedies is applicable only where a party has elected between inconsistent remedies for the same injury or cause of action. Familiar instances of this doctrine are where a party waives a tort and sues in assumpsit or where he elects to sue in replevin for property unlawfully taken in preference to bringing a suit for money damages for the unlawful taking, or where a party elects to affirm a contract and sue for a breach thereof rather than to sue for a rescission of the contract, etc. The doctrine does

17. *Snow v. Alley*, 156 Mass. 193, 30 N. E. 691; *Metcalf v. Williams*, 144 Mass. 452, 11 N. E. 700; *Thomas v. Watt*, 104 Mich. 201, 62 N. W. 345; *Tierman's Ex'r v. Security Building & Loan Ass'n*, 152 Mo. 135, 53 S. W. 1072.

18. *Whiteside v. Brawley*, 152 Mass. 133, 24 N. E. 1088; *Shanahan*

*v. Coburn*, 128 Mich. 692, 87 N. W. 1038; *Chicago, B. & Q. R. Co. v. Bigley*, 1 Neb. (Unoff.) 225, 95 N. W. 344.

19. *Hogan v. New York Cent. & H. River R. Co.*, 139 C. C. A. 328, 223 Fed. 890, 12 N. C. C. A. 1050.

not apply to concurrent remedies that are not inconsistent with each other and has no application to an election between suits based upon different statutes. Where one has a right of action at common law and also under the statute for the same injury, the bringing of either of said suits is not a bar to the other, and particularly where no recovery has been had under the one or the other. Apparently in this case the administratrix supposed she had a right of action under the Federal Employers' Liability Act and brought suit under that statute. By the judgment of the court in that case it was determined that she had no such right of action. She then brought her action for compensation under the state law. A suit under a state law and a judgment therein against the plaintiff are no bar to a suit for the same injury under the federal Employers' Liability Act, where it appears that there could be no recovery under the state law for the injury. *Troxell v. Delaware, Lackawanna & Western Railroad Co.*, 227 U. S. 434, 33 Sup. Ct. 274, 57 L. Ed. 586. The converse of that proposition is equally true — i. e., that a judgment against plaintiff in a suit brought under the federal Employers' Liability Act is no bar to an action under a state law for the same injury, where it is determined that the party injured was not engaged or employed in interstate commerce at the time of the injury."<sup>20</sup>

**§ 712. When Suit Under State Law is Res Adjudicata.** Unless there is an identity of parties and of subject matter, a suit prosecuted and determined under the state law, is not a bar to a subsequent suit under the federal act. A judgment against the widow who sued in her individual capacity for herself and her children to recover damages from an interstate carrier for the death of her husband while in its employ, which was prosecuted and tried under the state law, and

20. *Jackson v. Industrial Board of Illinois*, 280 Ill. 526, 117 N. E. 705.

which provided that there should be no recovery for the negligence of a fellow servant, is not a bar to a subsequent suit by her as administratrix, for the benefit of herself and the same children against the carrier under the federal act in which recovery was asked, because of the negligence of such fellow servant.<sup>21</sup> Mr. Justice Day, speaking for the court in that case, said: "To work an estoppel the first proceeding and judgment must be a bar to the second one because it is a matter already adjudicated between the parties. The cause of action under the state law, if it could be prosecuted to recover for the wrongful death alleged in this case, was based upon a different theory of the right to recover than prevails under the Federal statute. Under the Pennsylvania law there could be no recovery for the negligence of the fellow-servants of the deceased. This was the issue upon which the case was submitted at the second trial and a recovery had. Whether the plaintiff could recover under the Pennsylvania statute was not involved in the second action, and the plaintiff's right to recover because of the injury occasioned by the negligence of the fellow servants was not involved in or concluded by the first suit. Furthermore, it is well settled that to work an estoppel by judgments there must have been identity of parties in the two actions. *Brown v. Fletcher's Estate*, 210 U. S. 82; *Ingersoll v. Coram*, 211 U. S. 335. The Circuit Court of Appeals in the present case, while recognizing this rule, disposed of the contention upon the ground that the parties were essentially the same in both actions—the first action was for the benefit of Lizzie M. Troxell and the two minor children, and the present case, although the action was brought by the administratrix, is for the benefit of herself and children and held that, except in mere form, the actions were for the benefit of the same persons and therefore the parties were practically the same; and

21. *Troxell v. Delaware, L. & W. R. Co.*, 227 U. S. 434, 57 L. Ed. 586, 33 Sup. Ct. 274.

that the omission to sue as administratrix was merely technical and would have been curable by amendment. This conclusion was reached before this court announced its decision in *American Railroad Co. v. Birch*, 224 U. S. 547. That action was brought under the Federal Employers' Liability Act by the widow and son of the decedent and not by the administrator. The lower court held that the requirement of the act that the suit should be brought in case of death by the personal representative of the deceased did not prevent a suit in the name of the persons entitled to the benefit of the recovery. In other words, the court ruled, as did the Circuit Court of Appeals in this case, that where it was shown that the widow and child were the sole beneficiaries, they might maintain the action without the appointment of a personal representative. This court denied the contention, and held that Congress, doubtless for good reasons, had specifically provided that an action under the Employers' Liability Act could be brought only by the personal representative, and the judgment was reversed without prejudice to the rights of such personal representative. We think that under the ruling in the *Birch Case* there was not that identity of parties in the former action by the widow and the present case, properly brought by the administratrix under the Employers' Liability Act, which renders the former suit and judgment a bar to the present action."

**§ 713. Errors in Actions under Federal Act Held Harmless on Appeal.** A judgment under the Federal Employers' Liability Act should not be reversed on account of an error by which the party appealing cannot have been prejudiced.<sup>22</sup> In all actions under the

22. *Kanawha & M. R. Co. v. Kerse*, 239 U. S. 576, 60 L. Ed. 448, 36 Sup. Ct. 174; *Chicago, R. I. & P. R. Co. v. Wright*, 239 U. S. 548, 60 L. Ed. 431, 36 Sup. Ct. 185; *Chicago & N. W. R. Co. v. Gray*, 237 U. S. 399, 59 L. Ed. 1018,

35 Sup. Ct. 620, 9 N. C. C. A. 452; *Grand Trunk Western Ry. Co. v. Thrift Trust Co.*, — Ind. App. —, 115 N. E. 685; *Vandalia R. Co. v. Stringer*, 182 Ind. 676, 106 N. E. 865, 107 N. E. 673; *South-ern Ry. Co. v. Howerton*, 182 Ind.

federal act where there are more than one beneficiary, the verdict should apportion the sum due each of them but where no instructions requiring the jury so to do were asked and no objection was made or exception taken to the verdict, the error has been held to be harmless on appeal.<sup>23</sup> A trial court in an action under the federal act instructed the jury on the measure of damages to a wife and dependent child that they should include the value of the support and "protection" they would have secured from the deceased had he lived. The court held that the word "protection" was used in a pecuniary sense in the instruction and that even if not so understood by the jury, the error under a state statute prohibiting a reversal for harmless errors, was not such as to justify a reversal.<sup>24</sup> In an action for the death of a fireman, prosecuted under the Federal Employers' Liability Act, the trial court instructed the jury that if an employe is injured through defective instrumentalities it is prima facie evidence of the company's negligence and that the railroad company "assumes the burden," of showing that it exercised ordinary care in furnishing the appliances. The Supreme Court of the United States, in passing on this instruction, held that it was not such an error as to justify a reversal where the court's charge in another clause plainly stated to the jury that the burden of proving negligence was on the plaintiff throughout the case.<sup>25</sup> An instruction in an action under the federal

208, 105 N. E. 1025, 106 N. E. 369;  
Louisville & N. R. Co. v. Thomas'  
Adm'r, 171 Ky. 471, 188 S. W. 463.

23. **United States.** Cetrul Vermont R. Co. v. White, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. 865, 9 N. C. C. A. 265, Ann. Cas. 1916B 252; Yazoo & M. V. R. Co. v. Wright, 125 C. C. A. 25, 207 Fed. 281; Southern R. Co. v. Smith 123 C. C. A. 488, 205 Fed. 360.

**Missouri.** Hardwick v. Wabash R. Co., 181 Mo. App. 156, 168 S. W. 328.

**Montana.** Doichinoff v. Chicago, M. & St. P. R. Co., 51 Mont. 582, 154 Pac. 924.

**Nebraska.** Hadley v. Union Pac. R. Co., 99 Neb. 349, 156 N. W. 765.

**Washington.** Anest v. Columbia & P. S. R. Co., 89 Wash. 609, 154 Pac. 1100.

24. Sweet v. Chicago & N. W. R. Co., 157 Wis. 400, 147 N. W. 1054.

25. Southern Ry.—Carolina Division v. Bennett, 233 U. S. 80,



act on the effect of contributory negligence in which the court charged the jury that they should "deduct" a reasonable amount for the plaintiff's contributory negligence instead of using the word "diminished," found in the federal statute, was held not to be an error.<sup>26</sup> Where an action by an employe engaged in interstate commerce was submitted to the jury under a state law and the difference between the state act and the act of Congress related only to contributory negligence, the state law being more favorable to the defendant than the federal act, the error in submitting the cause as if the state act were controlling, afforded no ground for reversal.<sup>27</sup> When the liability of the defendant does not appear to be affected by the question whether the state or the federal law applied to the case, it is therefore unnecessary for the appellate court to decide which law applies as prejudicial error does not exist.<sup>28</sup>

**§ 714. Practice of Granting Partial New Trials in Actions under Federal Act Proper; When.** A practice of granting partial new trials in actions under the federal act following the procedure of the forum, does not deprive a litigant of a substantive right or defense under the statute if it clearly appears that the matter involved and upon which a new trial was granted is entirely distinct and separable from other matters involved in the case and that no possible injustice can be done to either party.<sup>29</sup> For example, in a suit under the act a jury found that the defendant

58 L. Ed. 860, 34 Sup. Ct. 566,  
10 N. C. C. A. 853.

26. *Tilghman v. Seaboard Air Line R. Co.*, 167 N. C. 163, 83 S. E. 315, 1090.

27. *Chicago, R. I. & P. R. Co. v. Wright*, 239 U. S. 548, 60 L. Ed. 431, 36 Sup. Ct. 185.

28. *Kansas City Western R. Co. v. McAdow*, 240 U. S. 51, 60 L. Ed.

520, 36 Sup. Ct. 252, 11 N. C. C. A. 857.

29. *Norfolk Southern R. Co. v. Ferebee*, 238 U. S. 269, 59 L. Ed. 1303, 35 Sup. Ct. 781; *Kennon v. Gilmer*, 131 U. S. 22, 33 L. Ed. 110, 9 Sup. Ct. 696; *Simmons v. Fish*, 210 Mass. 563, Ann. Cas. 1912D 588, 97 N. E. 102; *Jarrett v. High Point Trunk & Bag Co.*, 144 N. C. 299, 56 S. E. 937.

was negligent and that the plaintiff was not guilty of any contributory negligence; but because of an error in the charge on the subject of damages, the state supreme court granted a partial new trial and remanded the case for a hearing in which the only question to be considered was the amount to be awarded the plaintiff.<sup>30</sup> On the second trial the jury again found for the plaintiff, the only issue submitted being the amount of his damages, and, on second appeal to the state supreme court, the railroad company contended that it was error to grant a new trial in which the question of damages only could be considered as, under the federal act, the defendant was entitled, in all cases, to prove contributory negligence in mitigation of damages. But as the jury in the first trial held that the plaintiff was not guilty of any contributory negligence, the question of damages and contributory negligence were distinct and separable and, therefore, a new trial on the one without submitting the other, was proper.<sup>31</sup> On writ of error to the national Supreme Court from the last judgment, the cause was affirmed, the court holding that the decision of the state court did not operate to deprive the railroad company of a federal right. The practice of granting a partial new trial, however, in actions under the Federal Employers' Liability Act, the court held, was not generally to be commended.<sup>32</sup>

**§ 715. Power of State Courts under Federal Act to Direct Entry of Judgment Notwithstanding Verdict.** Under the federal practice a trial court has no power to direct a judgment to be entered notwithstanding the verdict of the jury.<sup>33</sup> It has been contended that in actions under the Federal Employers' Liability Act the state courts must therefore follow the procedure of

30. *Ferebee v. Norfolk Southern R. Co.*, 163 N. C. 351, 52 L. R. A. (N. S.) 1114, 79 S. E. 685.

31. *Ferebee v. Norfolk Southern R. Co.*, 167 N. C. 290, 83 S. E. 360.

32. *Norfolk Southern R. Co.*

*v. Ferebee*, 238 U. S. 269, 59 L. Ed. 1303, 35 Sup. Ct. 781.

33. *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, 57 L. Ed. 879, 33 Sup. Ct. 523, Ann. Cas. 1914D 1029.

the federal courts, but the courts of a state may follow their own procedure notwithstanding they are enforcing rights under federal laws.<sup>34</sup>

**§ 716. Power of Administrator to Settle Claims Under Federal Act Without Consent of Court.** The power of an administrator to settle a claim for damages under the Federal Employers' Liability Act without the consent of the court, must necessarily depend upon the laws of the state under which he is acting. The Supreme Court of Arkansas has held that an administrator may compromise and accept settlement of a claim for damages under the federal statute without special authority from the probate court.<sup>35</sup>

**§ 717. State Laws Adding Penalties to Judgment when Affirmed on Appeal Applicable under Federal Act.** A state law which provides a penalty of ten per cent upon any judgment when the cause is affirmed on appeal may be lawfully applied to actions affirmed in the state courts under the Federal Employers' Liability Act.<sup>36</sup> "The first of the other objections," said the court in the case cited, "is that the Court of Appeals was not authorized to add ten per cent. damages on the amount of the judgment, as it did. But the railroad company obtained a supersedeas, and the law of the State makes ten per cent. the cost of it to all persons if the judgment is affirmed. There was no obligation upon the State to provide for a suspension of the judgment and nothing to prevent its making it costly in cases where ultimately the judgment is upheld. So the State may allow interest upon a judgment from the time when it is rendered, if it provides appellate proceedings and the judgment is affirmed, as but for such proceedings interest would run as of course until the judgment was paid."

34. *Marshall v. Chicago, R. I. & P. R. Co.*, 133 Minn. 460, 157 N. W. 638.

35. *Treadway v. St. Louis, I. M.*

*& S. R. Co.*, 127 Ark. 211, 191 S. W. 930.

36. *Louisville & N. R. Co. v. Stewart*, 241 U. S. 261, 60 L. Ed. 989, 36 Sup. Ct. 586.

**§ 718. Plaintiff in Action Under Federal Act May Sue as a Poor Person in United States Courts, When.** In an action under the Federal Employers' Liability Act prosecuted in the courts of the United States the plaintiff, by order of court, may commence and prosecute the action without being required to prepay fees and costs, upon filing in court a statement under oath in writing that because of his poverty he is unable to pay the costs of the suit or to give security for the same and that he believes he is entitled to the redress he seeks by the action and setting forth briefly the nature of his alleged cause of action.<sup>37</sup> The Act of Congress permitting a person to sue as poor person in the federal courts is as follows: "That any citizen of the United States entitled to commence or defend any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or a writ of error, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after bringing suit or action, or upon suing out a writ of error or appealing, upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action or of such writ of error or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks by such suit or action or writ of error or appeal, and setting forth briefly the nature of his alleged cause of action or appeal."

37. Act of Congress approved June 25, 1910, c. 435, Fed. Stat. Ann., 1912 Supp. p. 45.

This statute has no application

to actions under the federal act prosecuted in state courts. *Go- ing's Adm'x v. Norfolk & W. R. Co.*, 119 Va. 543, 89 S. E. 914.

## PART FOUR

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### DUTIES OF CARRIERS UNDER FEDERAL SAFETY APPLIANCE ACTS



## CHAPTER XXXIX.

### HISTORICAL REVIEW OF ORIGINAL SAFETY APPLIANCE ACT WITH ALL AMENDMENTS AND ORDERS THEREUNDER.

- Sec. 719. Futile Legislation of the States Requiring the Use of Automatic Couplers.
- Sec. 720. Liability of Carriers under the Common Law as to Couplers and Brakes.
- Sec. 721. Causes Inducing the Enactment of the Original Federal Safety Appliance Act.
- Sec. 722. Summary of the Provisions of the Original Act of 1893.
- Sec. 723. Original Order of Commission Prescribing Standard Height of Drawbars on Freight Cars.
- Sec. 724. Inadequacies and Defects of Statute and Difficulties in its Enforcement.
- Sec. 725. Summary of the Amendments of 1903.
- Sec. 726. Order of Commission Increasing Minimum Percentage of Cars in Trains to be Equipped with Air Brakes.
- Sec. 727. Agitation for Standard Safety Appliances on all Cars used by Railroads Engaged in Interstate Commerce.
- Sec. 728. Interstate Commerce Commission Authorized to Standardize Appliances by Amendment of 1910.
- Sec. 729. New Order Concerning Height of Drawbars on Freight Cars.
- Sec. 730. Standardization Order of the Interstate Commerce Commission.

**§ 719. Futile Legislation of the States Requiring the Use of Automatic Couplers.** The first legislative action by a state requiring automatic couplers on railroad cars was taken by Connecticut in 1882. The statute prescribed that automatic couplers, approved by the railroad commission, must be placed on all new cars, under a penalty. A statute nearly identical in its provisions was enacted by Massachusetts in 1884. In that year also the Legislature of New York passed a law providing that after July 1, 1886, no couplers other than automatic should be placed upon any new freight car to be built or purchased for use in the state. In 1885, a statute quite similar, naming the same date, July 1, 1886, was enacted in Michigan. In 1889, a further statute was enacted in New York which provided that after November 1, 1892, it should be un-

(1251)

lawful for railroads to run any of their own cars in that state unless equipped with automatic couplers. But uniformity of equipment on all cars was not furthered by these statutes since different commissions approved different couplers. The need, therefore, of a national regulation of the subject was apparent. In its report for the year 1888, the Railroad Commission of New Hampshire said: "No commission whose authority is bounded by State lines can go fast or far in compelling the roads within its jurisdiction to adopt safety devices and appliances necessary for the protection of employes and passengers, such as steam heaters, electric lights, and automatic couplers. Even if we assume that a State may delegate to a commission the power to prohibit upon its territory any but approved equipment upon cars used in interstate traffic, it is absolutely necessary that such equipment should be uniform upon all roads constituting a through line, and the obstacles in securing uniformity by the action of the several States through which such roads pass are apparent. The regulation of these matters may properly be, and indeed must be, left to Congress or the Interstate Commission, which can prescribe rules applicable to the entire country, and make orders that can be enforced upon entire railway systems. With this in view the board has this year joined the commissions of other States in addressing to Congress a petition asking that the Interstate Commission be required to investigate the subject and propose some plan by which the desired results can be secured."

**§ 720. Liability of Carriers under the Common Law as to Couplers and Brakes.** The common law was entirely inadequate to protect the lives of trainmen from injuries due to the use of hand brakes and link and pin couplers. As a rule, the courts held that employes assumed the risks and hazards of the use of cars with different kinds of couplers.<sup>1</sup> For example, it was

1. *Baltimore & O. S. W. R. Co.* 560, 20 Sup. Ct. 385; *Southern Pac. Co. v. Volgt*, 176 U. S. 498, 44 L. Ed. Co. v. Seley, 152 U. S. 145, 38 L.



held that a brakeman assumed the risk of injury in coupling two cars having couplers of unequal height.<sup>2</sup> In another case it was held that where a railroad company was in the habit of receiving and transporting cars loaded with timbers and iron rails which projected over the cars on which they were loaded, the risks arising from such projecting timbers or rails were assumed by trainmen.<sup>3</sup> An employe assumed the risk from foreign cars constructed with double dead-woods, though those of his employer were constructed differently.<sup>4</sup> An experienced brakeman was held to have assumed the risk from the use of a different kind of automatic coupler on a car from that of an engine.<sup>5</sup>

**§ 721. Causes Inducing the Enactment of the Original Federal Safety Appliance Act.** Before the passage of the original Safety Appliance Act in 1893, the use of link and pin couplers on railroad cars in the United States lead to an appalling loss of life and limbs among railroad employes. In the late 80's and early 90's comparatively few freight cars were equipped with air brakes and automatic couplers.<sup>6</sup> The hazardous situation of railroad employes was thus described by the Interstate Commerce Commission:<sup>7</sup> "The justice of the demands of the railroad employes for uniformity in safety appliances, more particularly in car couplers, can not be questioned and can better be appreciated when the difficulties, which the trainmen encounter

Ed. 391, 14 Sup. Ct. 530; Washington & G. R. Co. v. McDade, 135 U. S. 554, 34 L. Ed. 235, 10 Sup. Ct. 1044; Northern Pac. R. Co. v. Blake, 11 C. C. A. 93, 63 Fed. 45; Boland v. Louisville & N. R. Co., 106 Ala. 641, 18 So. 99; Michigan Cent. R. Co. v. Smithson, 45 Mich. 212, 7 N. W. 791; Haniggan v. Lehigh & H. River Ry. Co., 157 N. Y. 244, 51 N. E. 992.

2. Hulett v. St. Louis, K. C. & N. Ry. Co., 67 Mo. 239.

3. Jackson v. Missouri Pac. Ry.

Co., 104 Mo. 448, 16 S. W. 413.

4. Chicago, B. & Q. R. Co. v. Curtis, 51 Neb. 442, 66 Am. St. Rep. 456, 71 N. W. 42.

5. Johnson v. Southern Pac. Co., 54 C. C. A. 508, 117 Fed. 462.

6. In the year 1892, the total number of railroad cars in the United States was 1,215,092, and 241,411 were equipped with automatic couplers.

7. Annual Report for the year 1891.

daily and hourly in coupling and uncoupling cars, is understood. Under existing conditions when there are so many couplers in use it is impossible for men to know before going between the cars whether they have the ordinary links and pins to couple together, or two different types of the large variety of couplers now in use. No matter what coupler is used, no matter how perfect its mechanism and working, if it does not couple as well and as freely with every other coupler now in use as it will with another coupler of its own make, it is to that extent, a death trap. What the railroad employes of the country demand is uniformity. They want all couplers alike, and they are the men whose lives and persons are at stake, for with about a million freight cars in use the change to any particular coupler must cause a great injury to their number, and loss of life in bringing it about. This great element of uncertainty, coupled with the danger to life and limb in consequence of such uncertainty should be remedied so that trainmen when coupling and uncoupling cars may know that the couplers will be of the same type." The annual toll of deaths and injuries due to the use of link and pin couplers became so great that Congress was repeatedly urged to legislate for the protection of trainmen. At the first national convention of state railroad commissioners, held in March, 1889, the following resolution was adopted: "Whereas thousands of railroad employes every year are killed or injured in coupling or uncoupling freight cars used in interstate traffic and in handling the brakes of such cars, and most of these accidents can be avoided by the use of uniform automatic couplers and train brakes; and Whereas the success and growth of the system of heating cars by steam from the locomotive or other single source largely depends on the adoption in interstate traffic of an uniform steam coupler; and Whereas these subjects are believed to be of pressing importance, and within the proper scope of the powers of the Congress of the United States, while attempts on the part of the individual States to deal with them have resulted, and

must continue to result, in conflicting regulations; Resolved, That we do respectfully and earnestly urge the Interstate Commerce Commission to consider what can be done to prevent the loss of life and limb in coupling and uncoupling freight cars used in interstate commerce, and in handling the brakes of such cars, and in what way the growth of the system of heating passenger cars from the locomotive or other single source can be promoted to the end that said Commission may make recommendations in the premises to the various railroads within its jurisdiction and make such suggestions as to legislation on said subjects as may seem necessary or expedient." President Harrison, in his final message to Congress on December 5, 1892, said: "Statistics furnished by the Interstate Commerce Commission show that during the year ending June 30, 1891, there were forty-seven different styles of car couplers reported to be in use, and that during the same period there were 2,660 employes killed and 26,140 injured. Nearly sixteen per cent. of the deaths occurred in the coupling and uncoupling of cars, and over thirty-six per cent of the injuries had the same origin." On March 2, 1893, the bill entitled "An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes," was approved and became a law.

**§ 722. Summary of the Provisions of the Original Act of 1892.** The original Safety Appliance Act of 1893 which took effect on January 1, 1898, consisted of eight sections.<sup>8</sup> Its purpose was declared in the title to be the promotion of the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their loco-

8. 27 Stat. at L. 531, Appendix G. *infra*.

motives with driving-wheel brakes and for other purposes. All carriers by railroad engaged in interstate commerce were required by the provisions of Section 1, to equip their locomotive engines used in moving interstate traffic with power driving wheel brakes and appliances for operating the train brake system and to equip a sufficient number of cars in each train hauling interstate traffic with train brakes so that the engineer on the locomotive could control the speed without requiring brakemen to use the common hand brake for that purpose. The second section required such common carriers to equip all cars used in moving interstate traffic with couplers coupling automatically by impact and which could be uncoupled, without the necessity of men going between the ends of the cars. Under Section 3, such carriers were given the right to refuse to receive, under certain conditions, cars from other railroads not equipped in accordance with the first section of the Act. Section 4 required all cars used in moving interstate commerce to be equipped with secure grabirons or handholds in the ends and sides for the greater security to men in coupling and uncoupling cars. The American Railway Association, under Section 5, was authorized to designate the standard height of drawbars on all freight cars used in interstate traffic. Section 6 fixed a penalty of One Hundred Dollars for each violation of the several sections of the statute, and also excepted certain cars from the provisions of the statute. Under the provision of Section 7, the Interstate Commerce Commission was given the power, for a good cause and upon hearing, to extend the period within which any carrier might comply with the act. Section 8 provided that no employe of any carrier subject to the act, injured by reason of any violation of the statute, shall be deemed to have assumed the risk thereby occasioned, although continuing in the employment after the violation of the Act had come to his knowledge.

**§ 723. Original Order of Commission Prescribing Standard Height of Drawbars on Freight Cars.** The American Railway Association was authorized, under the provisions of section 5 of the original Act, to designate to the Interstate Commerce Commission within ninety days after the passage of the act, the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States and to fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. On May 22, 1893, the American Railway Association certified to the Interstate Commerce Commission the standard height of drawbars adopted. Pursuant thereto, the Commission, on June 6, 1893, made the following order: "It is ordered that notice be at once given to all common carriers, owners, or lessees engaged in interstate commerce in the United States, that the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, has been designated and determined by the American Railway Association, mentioned in said act, as and to be thirty-four and one-half inches for standard gauge railroads in the United States, and twenty-six inches for narrow gauge railroads in the United States; that the maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars, both for standard and narrow gauge railroads in the United States, has been fixed and determined by said association at three inches; and that such determination has been duly certified by said association to the Interstate Commerce Commission."

**§ 724. Inadequacies and Defects of Statute and Difficulties in its Enforcement.** The amendment of 1903<sup>9</sup> to the original act resulted from a variety of

9. 32 Stat. at L. 943.

engaged in interstate commerce, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith. Section 2 of the 1903 amendment provides that no train shall be operated with power or train brakes unless it be equipped with not less than fifty per cent of the cars in the train having air brakes, and further requires all power-brake cars in such a train associated together with the said fifty per cent, to have their brakes so used and operated. In addition, the Interstate Commerce Commission was given the power and authority to increase the minimum percentage of cars in any train required to be operated with air brakes. Section 3 of the 1903 amendment provides that nothing in the amended act shall be construed to relieve any common carrier, the Interstate Commerce Commission or any United States District Attorney from any of the provisions, powers and duties under the original act, and all of the provisions of the original act were made applicable to the amended statute.

**§ 726. Order of Commission Increasing Minimum Percentage of Cars in Trains to be equipped with Air Brakes.** Pursuant to the authority delegated to it by Congress in Section 3 of the 1903 amendment, the Interstate Commerce Commission, on November 15, 1905, increased the minimum percentage of power or train brake cars from fifty per cent to seventy-five per cent. Again on June 6, 1910, the Interstate Commerce Commission further increased the minimum to eighty-five per cent. That order is as follows: "It is ordered that on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than eighty-five per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-brake trains in every such train which are associated together with the eighty-five per cent, shall

causes. The decision of the Federal Circuit Court of Appeals in *Johnson v. Southern Pac. Co.*,<sup>10</sup> holding that when two cars equipped with automatic couplers failed to couple because they were equipped with couplers of different type the carrier did not violate the statute, was one of them. This decision largely nullified the purpose of the coupler provision of the statute, for it was the evident purpose of Congress to require all cars to couple automatically, no matter with what kind, make or type of coupler they might be equipped. The enforcement of penalties for violations of the first section of the act became difficult for the reason that the clause "a sufficient number of cars in it so equipped with power or train brakes that the engineer of the locomotive drawing such train can control its speed" was not definite enough. The question as to what constituted a sufficient number of cars became a matter of individual judgment among railroad experts. This led to an uncertainty in determining when the carrier was complying with the law. Another obstacle in the enforcement of the statute was the requirement as to proof of the use of a defective car in interstate commerce. Frequently, the plaintiff in a personal injury suit, and the government in actions for penalties, were unable to prove that the particular car was at the time used in hauling interstate freight. The original act also did not apply to railroads in territories over which Congress had complete and plenary power. These were some of the reasons which caused the passage of the 1903 amendment.

### § 725. Summary of the Amendments of 1903.

By the passage of the amendment of 1903 to the original Federal Safety Appliance Act, the provisions of the original act were made applicable to all common carriers by railroad in the territories and in the District of Columbia, and also to all trains, locomotives, tenders, cars and similar vehicles used on any railroad

10. 54 C. C. A. 508, 117 Fed. 462.

have their brakes so used and operated." The order of June 6, 1910, which became effective on September 1, 1910, now applies to all common carriers by railroad engaged in interstate commerce.

§ 727. **Agitation for Standard Safety Appliances on all Cars used by Railroads Engaged in Interstate Commerce.** The salutary results of the enforcement of the original act and the amendment of 1903, requiring air brakes, couplers, certain grabirons, and handholds, and a standard height for drawbars on all cars on interstate railroads soon led to a public demand for a standardized equipment of all safety appliances on cars. Both the Master Car Builders Association and the Interstate Commerce Commission suggested the desirability of legislation requiring uniformity of application and location of all appliances on cars, including ladders, sill steps, handholds and kindred equipment.

§ 728. **Interstate Commerce Commission Authorized to Standardize Appliances by Amendment of 1910.** The 1910 amendment resulted from the agitation for uniformity as to all safety appliances on cars, including the appliances required by the former statutes. Section 1 of the 1910 amendment prescribes that the provisions of the amendatory act should apply to every common carrier, and every vehicle subject to the former acts. Section 2 requires all carriers subject to the act to provide all cars with secure sill steps and efficient hand brakes, and also requires all cars requiring secure ladders and secure running boards to be equipped with such ladders and running boards, and all cars having ladders, to be equipped with secure handholds on their roofs at the tops of such ladders, but provides that in the loading and hauling of long commodities requiring more than one car, handholds might be omitted on all save one of the cars thus combined for such a purpose. Section 3 delegates the power to the Interstate Commerce Commission, after hearing, to designate the



number, dimension, location and manner of application of the appliances required by Section 2 of the 1910 act and Section 4 of the original Safety Appliance Act, and provides that after due notice the said order designating the number, location, dimension and manner of application of such appliances shall be the standard of equipment on all cars subject to the provisions of the act unless changed by an order of the Interstate Commerce Commission, after full hearing, and for good cause. By the same section, the Commission was given authority to modify or change the standard height of drawbars. Section 4 of the amendment prescribes that any common carrier subject to the act, found guilty of hauling or using on its line, any cars subject to the requirements of the 1910 amendment, not equipped as provided by that act, shall be liable to a penalty of One Hundred Dollars, but further provides that if a car be equipped as provided by the act, and such equipment shall become defective while the car is used on the line, the car may be hauled from the place where such equipment was first discovered, to the nearest available point for repair, if such movement is necessary to make such repair, and such repair cannot be made except at such repair point. The act, however, declares that such a movement shall be made at the sole risk of the carrier and nothing therein can be construed to relieve the carrier from liability in any remedial action for the death or injury of any railroad employe by reason of or in connection with the movement of such defective equipment.

**§ 729. New Order Concerning Height of Drawbars on Freight Cars.** The Interstate Commerce Commission on October 10, 1910, pursuant to the authority given it in Section 3 of the 1910 amendment, made a new order governing the height of drawbars on all freight cars used on standard-gauge railroads as well as narrow-gauge. Said order became effective on December 31, 1910, and is as follows: "It is ordered That (except on cars specified in the proviso in section 6 of the Safety

Appliance Act of March 2, 1893, as the same was amended April 1, 1896), the standard height of drawbars heretofore designated in compliance with law is hereby modified and changed in the manner hereinafter prescribed, to-wit: The maximum height of drawbars for freight cars measured perpendicularly from the level of the tops of rails to the centers of drawbars for standard-gauge railroads in the United States subject to said Act shall be 34 1-2 inches, and the minimum height of drawbars for freight cars on such standard-gauge railroads measured in the same manner shall be 31 1-2 inches, and on narrow-gauge railroads in the United States subject to said Act the maximum height of drawbars for freight cars measured from the level of the tops of rails to the centers of drawbars shall be 26 inches, and the minimum height of drawbars for freight cars on such narrow-gauge railroads measured in the same manner shall be 23 inches, and on 2-foot-gauge railroads in the United States subject to said Act the maximum height of drawbars for freight cars measured from the level of the tops of rails to the centers of drawbars shall be 17 1-2 inches, and the minimum height of drawbars for freight cars on such 2-foot-gauge railroads measured in the same manner shall be 14 1-2 inches. And it is further ordered, That such modification or change shall become effective and obligatory December 31, 1910."

**§ 730. Standardization Order of the Interstate Commerce Commission.** After the passage of the 1910 amendment authorizing the Interstate Commerce Commission to designate the number, location, dimension and manner of application of the appliances mentioned in Section 2 of the 1910 amendment, and Section 4 of the original act, the Interstate Commerce Commission proceeded to hold hearings and all carriers subject to the provisions of the act were made parties thereto. On March 13, 1911, it adopted what is known as the Standardization Order of the Commission, which applies to all carriers by railroad engaged in interstate com-

merce, and which designates the number, location, dimension and manner of application of all sill steps, hand brakes, ladders, running boards, grabirons and handholds on all cars and vehicles subject to the act. The order includes box cars, hopper and gondola cars flat cars, tank cars, caboose cars, passenger cars, locomotives in road service, and locomotives in switching service.<sup>11</sup> On the same day the Commission entered another order extending the time within which the carriers were required to comply with the order, certain appliances not being required until July 1, 1916. This order was again extended from time to time, the last extension being made on February 1, 1918.<sup>12</sup>

11. For full copy of order, see appendix H, *infra*.

12. For full copy of last extension order, see appendix H, *infra*.

## CHAPTER XL.

### PURPOSE, GENERAL SCOPE, VALIDITY, INTERPRETATION AND EFFECT OF STATUTE.

- Sec. 731. Validity of the Original Safety Appliance Act of 1903.
- Sec. 732. Purpose and Object of Congress in Enacting the Safety Appliance Act.
- Sec. 733. Construction of Statute.
- Sec. 734. Rules Governing Construction of Criminal Statute not Applicable.
- Sec. 735. Federal Decisions Control in Construing Safety Appliance Act.
- Sec. 736. Custom of Railroads with Acquiescence of Commission persuasive in Determining Meaning of Statute.
- Sec. 737. Distinction Between This Statute and Employers' Liability Act as to Intrastate Commerce.
- Sec. 738. Remedial Provisions of Safety Appliance Act not Limited to Employees.
- Sec. 739. Statute Applies to All the Territories of the United States and the District of Columbia.
- Sec. 740. Safety Appliance Act as Amended Includes Cars Used in Intrastate as Well as in Interstate Commerce.
- Sec. 741. Constitutionality of Amendment Including Cars Used Exclusively in Interstate Commerce.
- Sec. 742. Relationship of Intrastate Cars to Interstate Commerce.
- Sec. 743. Meaning of the Term "Used" on Interstate Highways.
- Sec. 744. Applicability of Statute to Intrastate Cars on Tracks Other Than Main Lines.
- Sec. 745. No Distinction Between Passenger and Freight Cars.
- Sec. 746. State Laws as to Safety Appliances on all Cars of Interstate Railroads Invalid.
- Sec. 747. Punishment of Crime Against Two Sovereignities Not Applicable in Such Cases.
- Sec. 748. Delegation to American Railway Association and Commission of Authority to Designate Height of Drawbars Valid.
- Sec. 749. Cars and Vehicles Subject to the Statute.
- Sec. 750. Statute Applies to Island of Porto Rico.
- Sec. 751. Carriers Hauling Car with Defective Appliances over Tracks of Another Railroad Subject to Penalty.

**§ 731. Validity of the Original Safety Appliance Act of 1903.** The original Safety Appliance Act was confined strictly to cars used in interstate commerce on railroads on the lines of common carriers by railroad engaged in interstate commerce. No attempt was made

in the original act to require appliances on cars used in intrastate commerce on such railroads. The provisions of the original act were so strictly within the power of Congress to regulate commerce among the states that no serious attempt was made to have the act declared invalid on that ground. The act was, however, many times declared to be constitutional.<sup>1</sup>

**§ 732. Purpose and Object of Congress In Enacting the Safety Appliance Act.** The chief object and purpose of the enactment of the Safety Appliance Act was to protect the lives and limbs of men engaged in the dangerous business of operating railroad trains, and to provide a particular mode to reach that result by requiring railroad companies to abolish and remove the old link and pin couplers and to replace them with automatic couplers and secure handholds in the ends and sides of cars used in interstate commerce. In the enactment of the original act, Congress was actuated by a humanitarian purpose, namely, to reduce the heavy annual toll of deaths and injuries among men engaged in railroad work.<sup>2</sup>

1. *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. Ed. 772, 13 Sup. Ct. 914; *Southern R. Co. v. Snyder*, 109 C. C. A. 344, 187 Fed. 492; *Chicago R. I. & P. R. Co. v. Brown*, 107 C. C. A. 300, 185 Fed. 80; *Wabash R. Co. v. United States*, 93 C. C. A. 393; 168 Fed. 1; *United States v. Southern Ry. Co.*, 164 Fed. 347; *United States v. Atlantic Coast Line R. Co.*, 153 Fed. 918; *Kelley v. Great Northern Ry. Co.*, 152 Fed. 211; *Plummer v. Northern Pac. Ry. Co.*, 152 Fed. 206; *United States v. Great Northern Ry. Co.*, 145 Fed. 438; *Kansas City, M. & B. R. Co. v. Flipppo*, 138 Ala. 487, 35 So. 457; *Philadelphia & R. R. Co. v. Winkler*, 4 Pennw. (Del.) 387, 56 Atl. 112.

2. *Delk v. St. Louis & S. F. R. Co.*, 220 U. S. 580, 55 L. Ed. 590, 31 Sup. Ct. 617; *Adair v. United States*, 208 U. S. 161, 52 L. Ed. 436, 28 Sup. Ct. 277, 13 Ann. Cas. 764; *Schlemmer v. Buffalo, R. & P. R. Co.*, 205 U. S. 1, 51 L. Ed. 681, 27 Sup. Ct. 407; *Gray v. Louisville & N. R. Co.*, 197 Fed. 874; *Erie R. Co. v. United States*, 116 C. C. A. 649, 197 Fed. 287; *Southern R. Co. v. Snyder*, 109 C. C. A. 344, 187 Fed. 492; *United States v. St. Louis Southwestern R. Co. of Texas*, 106 C. C. A. 230, 184 Fed. 28; *United States v. Oregon Short Line R. Co.*, 180 Fed. 483; *Hohenleitner v. Southern Pac. Co.*, 177 Fed. 796; *United States v. Chicago, R. I. & P. Ry. Co.*, 173 Fed. 684; *United States*

**§ 733. Construction of Statute.** The Safety Appliance Act is a remedial statute and the courts construe its provisions so as to accomplish the intent of Congress,—to protect the lives and limbs of men engaged in interstate commerce.<sup>3</sup> While it has a penal provision, the rule requiring absolute strictness of construction is not applied to it;<sup>4</sup> for its primary purpose is to promote the public welfare, and the desire to grant relief is more prominent in the act than the thought of inflicting punishment.<sup>5</sup> The interpretation ordinarily applied to a criminal statute is inapplicable.<sup>6</sup> The statute should be liberally construed to effectuate its purpose to protect employes and the public.<sup>7</sup>

**§ 734. Rules Governing Construction of Criminal Statute not Applicable.** The rules of law which govern the construction of criminal statutes should not be

v. Southern Ry. Co., 170 Fed. 1014; Atlantic Coast Line R. Co. v. United States, 94 C. C. A. 35, 168 Fed. 175; United States v. Chicago Great Western Ry. Co., 162 Fed. 775; United States v. Philadelphia & R. Ry. Co., 160 Fed. 696; United States v. Atchison, T. & S. F. Ry. Co., 150 Fed. 442; United States v. Chicago, M. & St. P. Ry. Co., 149 Fed. 486; Chicago, M. & St. P. R. Co. v. Voelker, 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264, Voelker v. Chicago, M. & St. P. Ry. Co., 116 Fed. 867; Lake Shore & M. S. R. Co. v. Benson, 85 Ohio St. 215, 41 L. R. A. (N. S.) 49, Ann. Cas. 1913A 945, 97 N. E. 417.

3. Louisville & N. R. Co. v. Layton, 243 U. S. 617, 61 L. Ed. 931, 37 Sup. Ct. 456; Illinois Cent. R. Co. v. Williams, 242 U. S. 462, 61 L. Ed. 437, 37 Sup. Ct. 128; United States v. Southern Ry. Co., 135 Fed. 122; Chicago, M. & St. P. R. Co. v. Voelker, 65 C. C.

A. 226, 129 Fed. 522, 70 L. R. A. 264.

4. United States v. Pere Marquette R. Co., 211 Fed. 220.

5. Southern R. Co. v. Snyder, 109 C. C. A. 344, 187 Fed. 492; United States v. Chicago, R. I. & P. Ry. Co., 173 Fed. 684; United States v. Southern Ry. Co., 135 Fed. 122; Chicago, M. & St. P. R. Co. v. Voelker, 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264.

6. Johnson v. Southern Pac. Co., 196 U. S. 1, 49 L. Ed. 363, 25 Sup. Ct. 158; Southern R. Co. v. Snyder, 109 C. C. A. 344, 187 Fed. 492; United States v. Illinois Cent. R. Co., 101 C. C. A. 15, 177 Fed. 801; United States v. Central of Georgia Ry. Co., 157 Fed. 893; United States v. Chicago, M. & St. P. Ry. Co., 149 Fed. 486; Southern Pac. Co. v. Allen, 48 Tex. Civ. App. 66, 106 S. W. 441.

7. International R. Co. v. United States, 151 C. C. A. 333, 238 Fed. 317.

applied in actions for the recovery of the statutory penalty provided in Section 6 of the act. The action is a civil one for the recovery of a penalty and the principal course in construing the act is to search out and follow the true intent of Congress and to adopt that meaning of the words of the statute which harmonizes best with the context, and promotes in the fullest manner the apparent policy and object of Congress.<sup>8</sup>

**§ 735. Federal Decisions Control in Construing Safety Appliance Act.** In construing the Safety Appliance Act, the state courts are bound by the decisions of the national courts.<sup>9</sup> It has been consistently held that in interpreting all federal statutes, the decisions of the national courts control over those of the state courts.<sup>10</sup>

**§ 736. Custom of Railroads with Acquiescence of Commission Persuasive in Determining Meaning of**

8. *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363; 25 Sup. Ct. 158; *United States v. Great Northern R. Co.*, 144 C. C. A. 209, 229 Fed. 927.

9. *Luken v. Lake Shore & M. S. R. Co.*, 248 Ill. 377, 140 Am. St. Rep. 220, 21 Ann. Cas. 82, 94 N. E. 175; *Montgomery v. Southern Pac. Co.*, 64 Ore. 597, 47 L. R. A. (N. S.) 13, 131 Pac. 507.

10. *Illinois. Elwell v. Hicks*, 180 Ill. App. 554; *Gilmore v. Sapp*, 100 Ill. 297.

*Indiana. First Nat. Bank of Richmond v. Turner*, 154 Ind. 456, 57 N. E. 110.

*Iowa. Brewster v. Chicago & N. W. Ry. Co.*, 114 Iowa 144, 89 Am. St. Rep. 348, 86 N. W. 221.

*Maryland. State use of Allen v. Pittsburgh & C. R. Co.*, 45 Md. 41.

*Minnesota. Koecker v. Minne-*

*apolis, St. P. & S. S. M. R. Co.*, 122 Minn. 458, 142 N. W. 874.

*Mississippi. Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 So. 53.

*Missouri. Beekman Lumber Co. v. Acme Harvester Co.*, 215 Mo. 221, 114 S. W. 1087; *Chandler v. St. Louis & S. F. R. Co.*, 127 Mo. App. 34, 106 S. W. 553; *Root v. Kansas City Southern R. Co.*, 195 Mo., 348, 6 L. R. A. (N. S.) 212, 92 S. W. 621; *Haseltine v. Central Nat. Bank*, 155 Mo. 66, 56 S. W. 895.

*Ohio. Board of Trustees v. Cuppett*, 52 Ohio St. 567, 40 N. E. 792; *Alexander v. Pennsylvania Co.*, 48 Ohio St. 623, 30 N. E. 69.

*Texas. Bank of Garrison v. Malley*, 103 Tex. 562, 131 S. W. 1064.

*Washington. Hall v. Hall*, 41 Wash. 186, 111 Am. St. Rep. 1016, 83 Pac. 108.

**Statute.** While the custom of railroads cannot operate to justify a violation of the Act, yet such a custom adopted and maintained with knowledge and acquiescence of the Interstate Commerce Commission, is persuasive evidence of the meaning of the statute; for the Commission employs inspectors to enforce the requirements of the act and is charged with the duty of prosecuting common carriers for a violation of the statute. For instance, no attempt has been made by the Commission to require automatic couplers between the engine and tender, nor have the railroads adopted such a practice. And in the order of the Interstate Commerce Commission, supplementing the Safety Appliance Act, and designating the number, dimensions, location and manner of application, of all automatic couplers, sill steps, hand brakes, ladders, running boards and handholds, as required by Section 4 of the original act and Section 2 of the Act of 1910, automatic couplers are only required at the front of the locomotive and at the rear of the tender. Such an interpretation of the act, by the body charged with its enforcement, the United States Supreme Court held, was persuasive evidence of its meaning.<sup>11</sup>

**§ 737. Distinction Between This Statute and Employers' Liability Act as to Intrastate Commerce.** Both the Safety Appliance Act and the Federal Employers' Liability Act are confined to common carriers by railroad engaged in interstate commerce. One deals primarily with employes of such carriers; the other deals with the instrumentalities of such carriers, that is, trains, cars and engines. The Employers' Liability Act applies solely to employes injured while engaged in interstate commerce. Employes engaged in intrastate transportation or commerce are excluded. But the Safety Appliance Act applies to and includes intrastate traffic

11. *Pennell v. Philadelphia & R. R. Co.*, 231 U. S. 675, 58 L. Ed. 430, 34 Sup. Ct. 220.



as well as interstate traffic. This is the fundamental distinction between the two laws. As the Safety Appliance Act applies to intrastate traffic as well as interstate traffic, its provisions therefore necessarily include trains and cars while used exclusively in moving intrastate traffic on a highway of interstate commerce. The Employers' Liability Act is not so broad, as an attempt to cover all employees of interstate carriers would render such a statute invalid. However, the national legislation as to cars used in intrastate commerce is valid, if the cars are used on an interstate railroad because Congress has the power to regulate instrumentalities used on any national interstate highway, whereas it would not have the power to legislate over all employees of common carriers engaged in interstate commerce unless those employees, in their employment, had some direct and immediate connection with interstate commerce.

**§ 738. Remedial Provisions of Safety Appliance Act not Limited to Employees.** The remedy given by the Federal Employers' Liability Act is limited to employees.<sup>12</sup> Its provisions do not extend to passengers or travelers on railroads. But the Safety Appliance Act is not so limited. The declared purpose of the Safety Appliance Act in the title is to promote the safety of employees and travelers upon railroads by compelling certain equipments upon cars.<sup>13</sup> Nothing in any of the provisions of the statute or the amendments confine their application to employees. Carriers under this statute are liable to travelers upon their lines as well as employees whenever the failure to obey any of the provisions of the Act is the proximate cause of an injury to them.

**§ 739. Statutes Applies to All the Territories of the United States and the District of Columbia.** Prior

12. Chicago, R. I. & P. R. Co. v. Bond, 240 U. S. 449, 60 L. Ed. 735, 36 Sup. Ct. 403, 11 N. C. C. A. 342.

13. Louisville & N. R. Co. v. Layton, 243, U. S. 617, 61 L. Ed. 931, 37 Sup. Ct. 456.

to the amendment of 1903, the Safety Appliance Act only applied to carriers by railroad engaged in interstate commerce. However, Congress had plenary power over all carriers by railroads in the Territories and the District of Columbia. By Section 1 of the amendment of 1903, the statute was broadened so as to apply to all common carriers by railroad in such places.<sup>14</sup> In a prosecution for a penalty or in a personal injury suit for a violation of the act in the District of Columbia or in the Territories, neither allegation nor proof is required of the engagement of the railroad company in interstate commerce as Congress has full and complete power over the Territories. By an executive order of President Roosevelt on January 6, 1909, the requirement of the act was also extended so as to include the Panama Canal Zone.

**§ 740. Safety Appliance Act as Amended Includes Cars Used in Intrastate as Well as in Interstate Commerce.** By the amendment of 1903, the scope of the original Safety Appliance Act was enlarged so that now all of its provisions apply to and include "all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce." Whether the particular car without the equipment required by the act, was, at the time of the injury, used in interstate commerce is now entirely immaterial in a personal injury action. Since the 1903 amendment was passed, an employe injured by reason of any defect due to a failure to comply with any provisions of the act, is within the protection of that law although the particular car was at the time used exclusively in intrastate commerce, provided, of course, the car was used on a railroad engaged in interstate commerce.<sup>15</sup> Prior to

14. *American R. Co. of Porto Rico v. Didricksen*, 227 U. S. 145, 57 L. Ed. 456, 33 Sup. Ct. 224.

15. *United States. San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476, 60 L. Ed. 1110, 36 Sup.

Ct. 626; *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. Ed. 874, 36 Sup. Ct. 482; *Southern R. Co. v. Railroad Commission of Indiana*, 236 U. S. 439, 59 L. Ed. 661 35 Sup. Ct. 304; *South-*

the 1903 amendment, the Government in an action for the penalty and an employe in a suit for damages, were required to show that the car not equipped as provided in the act, was "used in moving in interstate traffic;" but under section 1 of the 1903 amendment, all of the provisions of the original act and of the 1903 amendment were made to apply to all trains, locomotives, tenders, cars and similar vehicles on any railroad engaged in interstate commerce.<sup>16</sup> The scope of the act is

*ern R. Co. v. United States*, 222 U. S. 20, 56 L. Ed. 72, 32 Sup. Ct. 2, 3 N. C. C. A. 822.

**Colorado.** *Felt v. Denver & R. G. R. Co.*, 48 Colo. 249, 21 Ann. Cas. 379, 110 Pac. 215, 1136.

**Illinois.** *Devine v. Chicago & C. River R. Co.*, 259 Ill. 449, 102 N. E. 803.

**Iowa.** *Stearns v. Chicago, R. I. & P. R. Co.*, 166 Iowa 566, 148 N. W. 128.

**Kansas.** *Thornbro v. Kansas City, M. & O. R. Co.*, 91 Kan. 689, Ann. Cas. 1915D 314, 139 Pac. 410.

**Minnesota.** *Hurley v. Illinois Cent. R. Co.*, 133 Minn. 101, 157 N. W. 1005; *Burho v. Minneapolis & St. L. R. Co.*, 121 Minn. 326, 141 N. W. 300.

**Missouri.** *Johnson v. Chicago Great Western R. Co.*, (Mo. App.), 164 S., W. 260.

**South Carolina.** *Lorick v. Seaboard Air Line Ry.* 102 S. C. 276, Ann. Cas. 1917D 920, 86 S. E. 675.

**Texas.** *State v. Orange & N. W. Ry. Co.*, — Tex. Civ. App. —, 181 S. W. 494.

16. Representative Wagner, while the 1903 amendment was under consideration in the House of Representatives, in explaining its purpose, said: "Mr. Speaker, the purpose of this act is to make

more effective the provisions of act of March 2, 1893, for the promotion of the safety of employes upon railways. It has been held by some courts that the tender of a locomotive is not a car, and is therefore not affected by the provisions of this act. It has also been held that the act only applies to cars in interstate movement, and cars are very frequently although generally designed for and used in the movement of interstate traffic, in use which is not interstate movement that requires the services of operatives upon them. Whenever an action for damages is brought by reason of the death or injury of a railroad employe, of course, every defense is made; and although the car may not be equipped as directed by the Act of Congress, yet that direction, as it stands, only applies when the car is being used in the movement of interstate commerce. Therefore the burden is on the plaintiff in every such action to establish that fact, and is frequently an impossibility, because frequently the injury or death does not happen when the car is so engaged in interstate commerce. It is therefore of the highest importance to make the act of Congress, as everybody supposed it would be, effective, so far as we

now such that the true test of its application is the use of the vehicle on a railroad which is a highway of interstate commerce, and not its use in moving interstate traffic. In the Rigsby case, cited in the notes, a brakeman was hurt while assisting in moving a "bad order" car from a repair track where it had been for a month, to a repair shop in the same yard—a movement which was purely intrastate in character. Answering the contention of the railroad company that he should not be permitted to recover under the Safety Appliance Act because he was not engaged in interstate commerce, the court said: "It is earnestly insisted that Rigsby was not under the protection of the Safety Appliance Acts because, at the time he was injured, he was not engaged in interstate commerce. By section 1 of the 1903 amendment its provisions and requirements and those of the Act of 1893 were made to apply 'to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce and on all other locomotives, tenders, cars and similar vehicles

have the power and authority, for the protection of employes, by requiring the equipment referred to in the act on all cars used on railroads engaged in interstate commerce. That is the purpose of the first section of the bill. The purpose of the second section is to require a more general and uniform use of air and air brakes, so as to have less need for the operation of hand brakes. The present act, as I recollect it, is that there must be sufficient air-breaking apparatus used to enable the engineer to control the train. That, of course, differs, perhaps, in the judgment of every engineer. Therefore it seems appropriate that there should be a certain percentage of the cars of every train required to be operated by air brakes, whether it is actually es-

sential for the proper control of the train or not."

The Interstate Commerce Commission in its Seventeenth Annual Report, at page 84, after the act had become a law, said: "The necessity of showing that a car was engaged in interstate commerce was another difficulty in the way of enforcing the law. It was necessary to get at the billing showing destination of cars, and to prove in each case that the car complained of was actually moving or used in interstate commerce at the time its defect was discovered. The amendment in question has obviated this difficulty. The law now applies to all equipment on the lines of carriers engaged in interstate commerce, without regard to the service in which it is used."

used in connection therewith,' subject to an exception not now pertinent. And by section 5 of the 1910 amendment the provisions of the previous acts were made to apply to that act, with a qualification that does not affect the present case. In *Southern R. Co. v. United States*, 222 U. S. 20, 56 L. Ed. 72, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822, which was an action to recover penalties for a violation of the acts with respect to cars some of which were moved in intrastate traffic, and not in connection with any car or cars used in interstate commerce, but upon a railroad which was a part of a through highway for interstate traffic, it was held that the 1903 amendment enlarged the scope of the original act so as to embrace all cars used on any railway that is a highway or interstate commerce, whether the particular cars are at the time employed in such commerce or not." As practically all railroads in the United States are constantly engaged in interstate commerce, this 1903 amendment by its terms includes nearly all railroad cars in the United States.

**§ 741. Constitutionality of Amendment Including Cars Used Exclusively in Intrastate Commerce.** The provision of the 1903 amendment extending all the requirements of the Safety Appliance Act to "all trains, locomotives, tenders, cars and other vehicles used on any railroad engaged in interstate commerce," irrespective of whether the car was used in intrastate or interstate commerce, is valid under the commerce clause of the Constitution. For cars containing interstate commerce and cars containing intrastate traffic are so interdependent in point of movement and safety that the absence of appropriate safety appliances on intrastate cars is a menace to trains or cars containing interstate commerce. In the practical operation of railroads and the general work of switching crews, there is such an intimate relationship to interstate commerce in requiring all cars on interstate highways by railroads to be equipped with safety appliances that

the amendment is within the constitutional grant of authority to Congress over that subject matter.<sup>17</sup>

**§ 742. Relationship of Intrastate Cars to Interstate Commerce.** The use of cars even in intrastate commerce on railroads engaged in interstate commerce, has such a direct and intimate relation to interstate commerce that the power of Congress extends thereto; for (a) the two classes of traffic, i. e., interstate and intrastate, in the practical operation of railroads are constantly carried in the same cars, and in the same trains, and are frequently commingled in switching and other movements at terminals; (b) the same train crews, switching crews and other employees are usually engaged in moving the two classes of commerce at the same time, or at least their general work is such that there is a close inter-dependent relationship between the movements of interstate and intrastate traffic, and (c) the use and movement with dispatch and safety of cars in interstate commerce, are dependent upon the proper and safe movement of cars containing intrastate commerce, for whatever brings disaster to the one is calculated to imperil the safety and impede the progress of the other.<sup>18</sup> These practical considerations arising

17. *Southern R. Co. v. Railroad Commission of Indiana*, 236 U. S. 439, 59 L. Ed. 661, 35 Sup. Ct. 304; *Brinkmeier v. Missouri Pac. Ry. Co.*, 224 U. S. 268, 56 L. Ed. 758, 32 Sup. Ct. 412; *Southern R. Co. v. United States*, 222 U. S. 20, 56 L. Ed. 72, 32 Sup. Ct. 2, 3 N. C. C. A. 822; *Devine v. Chicago & C. River R. Co.*, 259 Ill. 449, 102 N. E. 803; *Stearns v. Chicago, R. I. & P. R. Co.*, 166 Iowa 566, 148 N. W. 128; *Popplar v. Minneapolis, St. P. & S. S. M. R. Co.*, 121 Minn. 413, Ann. Cas. 1914D 383, 141 N. W. 798.

18. *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. Ed. 874,

36 Sup. Ct. 482. In the *Rigsby* case, the court, in stating its reason for the constitutionality of the 1910 amendment, did not place it solely on the ground that the movement of the defective car on a main line had a direct connection with interstate commerce, but said: "But we are unwilling to place the decision upon so narrow a ground, because we are convinced that there is no constitutional obstacle in the way of giving to the act in its remedial aspect as broad an application as was accorded to penal provisions in *Southern R. Co. v. United States*, *supra*. In addition to what

from the operation and movement of cars on railroads, led the Supreme Court to hold that there was such a

has been quoted from the opinions in that case and the Behrens Case the following considerations are pertinent. In the exercise of its plenary power to regulate commerce between the states, Congress has deemed it proper, for the protection of employees and travelers, to require certain safety appliances to be installed upon railroad cars used upon a highway of interstate commerce, irrespective of the use made of any particular car at any particular time. Congress having entered this field of regulation, it follows from the exclusive nature of its authority that state regulation of the subject-matter is excluded. *Southern R. Co. v. Railroad Commission*, 236 U. S. 439, 59 L. Ed. 661, 35 Sup. Ct. Rep. 304. Without the express leave of Congress, it is not possible, while the Federal legislation stands, for the states to make or enforce inconsistent laws giving redress for injuries to workmen or travelers occasioned by the absence or insecurity of such safety devices, any more than laws prescribing the character of the appliances that shall be maintained, or imposing penalties for failure to maintain them; for the consequences that shall follow a breach of the law are vital and integral to its effect as a regulation of conduct, liability to private suits is or may be as potent a deterrent as liability to public prosecution, and in this respect there is no distinction dependent upon whether the suitor was injured while employed or travel-

ing in one kind of commerce rather than the other. Hence, while it may be conceded, for the purposes of the argument, that the mere question of compensation to persons injured in intrastate commerce is of no concern to Congress, it must be held that the liability of interstate carriers to pay such compensation because of their disregard of regulations established primarily for safeguarding commerce between the states is a matter within the control of Congress; for unless persons injured in intrastate commerce are to be excluded from the benefit of a remedial action that is provided for persons similarly injured in interstate commerce, a discrimination certainly not required by anything in the Constitution,—remedial actions in behalf of intrastate employees and travelers must either be governed by the acts of Congress or else be left subject to regulation by the several states, with probable differences in the law material to its effect as regulatory of the conduct of the carrier. We are therefore brought to the conclusion that the right of private action by an employee injured while engaged in duties unconnected with interstate commerce, but injured through a defect in a safety appliance required by the act of Congress to be made secure, has so intimate a relation to the operation of the act as a regulation of commerce between the states that it is within the constitutional grant of authority over the subject."

direct connection between cars on interstate highways and interstate commerce that the amendment was valid under the power to regulate commerce among the states.

**§ 743. Meaning of the Term "Used" on Interstate Highways.** The 1903 amendment extending all the provisions of the original act to all cars, trains and similar vehicles on railroads engaged in interstate commerce, limits the application of the act to such vehicles "used" on such railroad. This term does not mean that the car must be actually used in transporting commerce at the time of the injury.<sup>19</sup> Any movement of a car that is proper or convenient in the operation of a railroad is an "use" within the meaning of the amendment. For instance, a car which had been on a repair track for a month and which was being moved from there to a repair shop in the same yard, was being used within the meaning of the amendment.<sup>20</sup>

19. *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. Ed. 874, 36 Sup. Ct. 482.

20. The United States Supreme Court in the *Rigsby* case, *supra*, did not discuss at great length the meaning of the term "used," but in holding that a movement of a bad order car to a repair yard was an "use" within the meaning of the Safety Appliance Act, it necessarily disapproved the dissenting opinion of Judge Pardee when the case was before the Circuit Court of Appeals. Judge Pardee said: "In the *Rigsby* case it is not proven nor claimed that the car in which *Rigsby* was injured was at the time being used in either interstate or intrastate traffic, or even being used at all. The undisputed facts appear to be that the car was out of use because of defective condition, and had been for more than a month, and at

the time *Rigsby* was hurt was not being moved for use. It was marked or labeled on each side with 'bad order' tag, and was being moved from the bad-order track to the railroad shop for the purpose of being repaired and put in order for use. The liability of the railroad company in moving the car is not in any wise claimed as based upon use of the same, and only because in moving the car to the shop for repairs it was for a very short distance required to be removed over a portion of the main track, so as to reach the railroad shop. To move the car to the shop was the only way the car could be put in order for use in any traffic. It could hardly have been intended by the Congress that a railroad company under heavy penalties should keep its cars in perfect order, with certain specific safety appliances and other-



**§ 744. Applicability of Statutes to Intrastate Cars on Tracks Other Than Main Lines.** The Safety Appliance Act applies to locomotives, cars and similar vehicles whenever and wherever they are located on the rails of an interstate highway. If the railroad is engaged in interstate commerce and that use is not restricted to the main line but is extended to side tracks, spurs and other like connections, then all cars on such tracks are within the purview of the Safety Appliance Act even though used at the time solely in intrastate commerce. This is not the point decided in the cases cited in the notes,<sup>21</sup> but such is the inevitable result from the principles therein adopted by the United States Supreme Court.

**§ 745. No Distinction Between Passenger and Freight Cars.** The statute makes no distinction between passenger and freight cars, and the provisions of the act apply to passenger cars as well as all other kinds of vehicles on railroads used in moving interstate commerce. "The Supreme Court, in *Johnson v. Southern*

wise, and yet that, after a disabled car has been taken entirely out of commerce, not to be used for any traffic whatever, the railroad company is to be penalized in favor of employes fully advised and warned that the car was in bad order and was to be moved only to the shop for repairs, for taking the only practical means at hand to have the car repaired and put in order. Certainly, under the harshest view to be taken of the requirements of the act of Congress, to penalize the railroad the out-of-order or disabled car must be *used* on a railroad engaged in interstate commerce; and in the *Rigsby* Case the question was whether the disabled car on which *Rigsby* was injured was at the time be-

ing *used* within the meaning and purview of the said act of Congress, and this under the evidence in the case was a question of fact which should have been submitted to the jury." The trial court in the *Rigsby* case had instructed the jury that as a matter of law a car moved from the repair track to the repair shop was "used" on a railroad and the charge was affirmed by the national Supreme Court.

21. *Texas & P. R. Co., v. Rigsby*, 241 U. S. 33, 60 L. Ed. 874, 36 Sup. Ct. 482; *Southern R. Co. v. United States*, 222 U. S. 20, 56 L. Ed. 72, 32 Sup. Ct. 2, 3 N. C. C. A. 822; *United States v. Chesapeake & O. R. Co.*, 130 C. C. A. 262, 213 Fed. 748; *Gray v. Louisville & N. R. Co.*, 197 Fed. 874.

Pacific Co., 196 U. S., 1, held the word 'car' used in sections 2, 6, and 8 of the original Act to have been used in its generic sense intended to include 'all kinds of cars running on the rails,' and that it did include a locomotive which could not couple automatically with a dining car. Section 6, so construed, expressly prescribed a penalty for the use of 'any car in violation of any of the provisions' of the Act, of course including section 4—the grab-iron section—which by the amended and declaratory Act of March, 1903, was to apply to 'all cars and similar vehicles used on any railroad engaged in interstate commerce.' The Johnson Case has been cited and approved since in *Schlemmer v. Buffalo, R. & P. Co.*, 205 U. S., 1. The contention that these cases, not having under specific consideration this particular section 4, do not apply here, and leaves the question of its application to passengers car, we think, untenable.'<sup>22</sup>

**§ 746. State Laws as to Safety Appliances on all Cars of Interstate Railroads Invalid.** In the absence of congressional legislation on the subject matter, the states have power to legislate concerning appliances on all vehicles used in interstate commerce, and on cars used in hauling interstate commerce on railroads. But when Congress exercises its power to regulate interstate commerce and the instrumentality thereof, and legislates as to appliances with which certain instrumentalities of that commerce must be furnished, then all state laws covering the same field or subject matter are inoperative, because the power of Congress must necessarily be and is exclusive. By the amendment of 1903 to the Safety Appliance Act, Congress legislated as to safety appliances on all cars used on any railroad engaging in interstate commerce and this act also included cars on such railroad when used exclusively in

22. *Norfolk & W. R. Co., v. Ry. Co.*, 184 Fed. 99. See also *United States*, 101 C. C. A. 249, *Spokane & I. E. R. Co. v. United States*, 241 U. S. 344, 60 L. Ed. 177 Fed. 623. To the same effect: *United States v. Norfolk & W.* 1037, 36 Sup. Ct. 668.

hauling intrastate commerce. Thereupon all state laws requiring appliances on any cars used on any interstate railroad became inoperative.<sup>23</sup> This principle was applied in a case where a railroad company was fined for failing to have grab-irons on a car as required by a state law of Indiana. The car was at the time used in transporting freight from one point to another in the state of Indiana, the line being entirely within that state, but the railroad company was generally engaged in interstate commerce. On writ of error to the Supreme Court of the United States, the state law was held to be invalid and the judgment of the state court assessing a penalty of a fine against the railroad company was set aside.<sup>24</sup>

**§ 747. Punishment of Crime Against Two Sovereignties Not Applicable in Such Cases.** While it is thoroughly established that the same act may constitute a criminal offense against two sovereignties and punishment by one does not prevent punishment by the other, and, while in the Indiana case mentioned in the foregoing paragraph, the state law was not in conflict with the Federal Act—the requirement as to grabirons in each being the same—the foregoing principle, however, applies solely to conditions and cases where the penal act is one over which both have jurisdiction. But when

23. *State v. Beaumont & G. N. R. R.*, — Tex. Civ. App. —. 183 S. W. 120.

24. *Southern R. Co. v. Railroad Commission of Indiana*, 236 U. S. 439, 59 L. Ed. 661, 35 Sup. Ct. 304, in which Mr. Justice Lamar, for the court, said: "Without, therefore, discussing the many cases sustaining the right of the States to legislate on subjects which, while not burdening, may yet incidently affect interstate commerce, it is sufficient here to say that Congress has so far oc-

cupied the field of legislation relating to the equipment of freight cars with safety appliances as to supersede existing and prevent further legislation on that subject. The principle is too well established to require argument. Its application may be seen in rulings in the closely analogous cases relating to state penalties for failing to furnish cars and to state penalties for retaining employes at work on cars beyond the time allowed by the Hours of Service Law."

Congress acts over a subject matter of interstate commerce, it has exclusive jurisdiction of that subject matter, and hence the exclusive right and power to punish. The test in determining exclusive federal control is not whether the state legislation is in conflict with the federal law, but whether Congress has legislated on the same subject matter within the purview of the commerce clause of the Constitution. When it assumes that jurisdiction, the national statute becomes the supreme and only rule of action.<sup>25</sup>

**§ 748. Delegation to American Railway Association and Commission of Authority to Designate Height of Drawbars Valid.** Congress, in the passage of Section 5 of the original act, delegating to the American Railway Association and the Interstate Commerce Commission, the power to designate the height of drawbars, did not thereby abdicate its own legislative power and, in contravention of the Constitution, delegate its legislative power.<sup>26</sup>

**§ 749. Cars and Vehicles Subject to the Statute.** Under the provisions of the original act which included

25. *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280, 58 L. Ed. 1312, 34 Sup. Ct. 829; *Erie R. Co. v. New York*, 233 U. S. 671, 58 L. Ed. 1149, 34 Sup. Ct. 756, 52 L. R. A. (N. S.) 266 Ann. Cas. 1915D 138; *St. Louis, I. M. & S. R. Co. v. Edwards*, 227 U. S. 265, 57 L. Ed. 506, 33 Sup. Ct. 262; *Savage v. Jones*, 225 U. S. 501, 56 L. Ed. 1182, 32 Sup. Ct. 715; *Northern Pac. R. Co. v. State ex rel. Atkinson*, 222 L. S. 370, 56 L. Ed. 237, 32 Sup. Ct. 160.

26. *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. Ed. 1061, 28 Sup. Ct. 616, rev'g 83 Ark. 591, 98 S. W. 958. Mr. Justice Moody, in that case, said: "It is contended that there is here an unconstitutional delega-

tion of legislative power to the Railway Association and to the Interstate Commerce Commission. This is clearly a Federal question. Briefly stated, the statute enacted that after a date named only cars with drawbars of uniform height should be used in interstate commerce, and that the standard should be fixed by the Association and declared by the Commission. Nothing need be said upon this question except that it was settled adversely to the contention of the plaintiff in error in *Buttfield v. Stranahan*, 192 U. S. 470, a case which in principle is completely in point. And see *Union Bridge Co. v. U. S.*, 204 U. S., 364, where the cases were reviewed."

"any car" and the amendment of 1903 which includes all "cars and similar vehicles" used on any railroad engaged in interstate commerce, the statute covers all kinds of cars running on the rails, including locomotives,<sup>27</sup> tenders,<sup>28</sup> shovel cars,<sup>29</sup> waycars,<sup>30</sup> passenger cars,<sup>31</sup> dining cars,<sup>32</sup> and empty cars.<sup>33</sup>

**§ 750. Statute Applies to Island of Porto Rico.**

While the original act only required the designated appliances on the railroads engaged in commerce among the states, the 1903 amendment extended the provision of the statutes to the Territories and the District of Columbia. The island of Porto Rico has not for all purposes been incorporated as a territory of the United States, but it has been held to be a territory within the meaning of the Safety Appliance Act.<sup>34</sup>

27. *Schlemmer v. Buffalo, R. & P. R. Co.*, 205 U. S. 1, 51 L. Ed. 681, 27 Sup. Ct. 407; *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363, 25 Sup. Ct. 158; *Chicago, M. & St. P. R. Co. v. United States*, 91 C. C. A. 373, 165 Fed. 423, 20 L. R. A. (N. S.) 473; *United States v. Chicago & N. W. Ry. Co.*, 157 Fed. 616; *United States v. Chicago, M. & St. P. Ry. Co.*, 149 Fed. 486.

28. *Philadelphia & R. R. Co. v. Winkler*, 4 Pennw. (Del.) 387, 56 Atl. 112; *Moore v. St. Joseph & G. I. R. Co.*, 268 Mo. 31, 186 S. W. 1035.

29. *Schlemmer v. Buffalo, R. & P. R. Co.*, 205 U. S. 1, 51 L. Ed. 681, 27 Sup. Ct. 407; *United States v. Chicago & N. W. Ry. Co.*, 157 Fed. 616.

30. *Chicago, M. P. S. R. Co. v. United States*, 116 C. C. A. 444, 196 Fed. 882; *Suttle v. Choctaw, O. & G. R. Co.*, 75 C. C. A. 470, 144 Fed. 668.

31. *Spokane & I. E. R. Co. v. United States*, 241 U. S. 344, 60

L. Ed. 1037, 36 Sup. Ct. 668; *United States v. Norfolk & W. Ry. Co.*, 184 Fed. 99; *Norfolk & W. R. Co. v. United States*, 101 C. C. A. 249, 177 Fed. 623.

32. *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363, 25 Sup. Ct. 158; *Chicago, M. & St. P. R. Co. v. United States*, 91 C. C. A. 373, 165 Fed. 423, 20 L. R. A. (N. S.) 473.

33. *Wheeling Terminal R. Co. v. Russell*, 126 C. C. A. 519, 209 Fed. 795; *Gray v. Louisville & N. R. Co.*, 197 Fed. 874; *Southern R. Co. v. Snyder*, 109 C. C. A. 344, 187 Fed. 492; *Erie R. Co. v. Russell*, 106 C. C. A. 160, 183 Fed. 722; *Johnson v. Great Northern R. Co.*, 102 C. C. A. 89, 178 Fed. 643; *Hohenleitner v. Southern Pac. Co.*, 177 Fed. 796; *Voelker v. Chicago, M. & St. P. R. Co.*, 116 Fed. 867; *Malott v. Hood*, 201 Ill. 202, 66 N. E. 247, aff'g 99 Ill. App. 360; *Breske v. Minneapolis & St. L. R. Co.*, 115 Minn. 386, 132 N. W. 337.

34. *American R. Co. of Porto*

**§ 751. Carriers Hauling Car with Defective Appliances over Tracks of Another Railroad Subject to Penalty.** Section 6 of the Appliance Act penalizes any carrier using or hauling any of the described vehicles "on its lines". A railroad company hauling a defective car over the tracks of another company under a traffic agreement violates the statute for such tracks constitute "its line" within the meaning of the Act. In other words, a licensee or lessee of a railroad track is amenable to the penalties of the statute and cannot escape liability by proof that another carrier owned the tracks on which it is operating its trains and cars.<sup>35</sup> The fact that its trains were operated subject to the orders of the dispatcher of the licensor, or that the inspection of the cars was made by the employes of the latter, will not relieve it of its duty under the law as a carrier and it cannot, by contract, evade the responsibilities placed upon it.

Rico v. Didricksen, 227 U. S. 145, 57 L. Ed. 456, 33 Sup. Ct. 224.

35. Philadelphia & R. R. Co. v. United States, 111 C. C. A. 661, 191 Fed. 1; Gray v. Louisville & N. R. Co., 197 Fed. 874; in which Sanford, J., said: "I am furthermore of opinion, after careful consideration, that the ground upon which peremptory instructions were given in this case, namely, that the Safety Appliance Act did not apply to this car while on the switch track of the Brookside Mills, was erroneous. It appears, at least by inference, that there was some arrangement by which the defendant was permitted by the Brookside Mills to use this switch track in its interstate business, bringing in upon this track, unloading and remov-

ing therefrom cars containing interstate freight consigned to the Brookside Mills. In the recent case of Philadelphia R. Co. v. United States, 191 Fed. 1, 111 C. C. A. 661, it was held by the Circuit Court of Appeals for the Third Circuit that where a railroad company operated its trains engaged in interstate commerce with its own engines and crews over the tracks of another company under a contract between them, such other tracks are a part of its line within the meaning of the Safety Appliance Act and its amendments so as to require cars operated upon them to be equipped with safety appliances as therein required. The doctrine of this case, in my opinion, is controlling in the case at bar."

## CHAPTER XLI.

### WHEN CARRIERS ARE ENGAGED AND CARS ARE USED IN INTERSTATE COMMERCE UNDER SAFETY APPLIANCE ACT.

- Sec. 752. Scope of Chapter.
- Sec. 753. What Constitutes Interstate Commerce within Purview of Safety Appliance Act.
- Sec. 754. Railroad Must be a Common Carrier.
- Sec. 755. Two Requirements as to Interstate Character of Carriers and Cars Prior to 1903 Amendment.
- Sec. 756. Proof of Use of Car in Moving Interstate Traffic not Essential Since the 1903 Amendment.
- Sec. 757. But Use of Car in Moving Interstate Traffic Still Material in Determining Application of Employers' Liability Act.
- Sec. 758. Interstate Status of Belt Lines, Terminal Railroads and Stock Yard Companies.
- Sec. 759. Railroad Wholly Within State Transporting Freight in Continuous Shipment Without Traffic Agreement with Other Carriers.
- Sec. 760. Foregoing Principle Illustrated and Applied in Adjudicated Cases.
- Sec. 761. Interurban Electric Railroads Participating in Movement of Interstate Traffic.
- Sec. 762. Industrial Railroads Forming Connecting Link for Interstate Transportation.
- Sec. 763. Transportation from One Point to Another in Same State Passing in Transit Through Another State.
- Sec. 764. All Cars Hauled in Interstate Trains Expressed with Interstate Character.
- Sec. 765. Switching of Car From One Yard to Another Preparatory for Interstate Trip.
- Sec. 766. Re-billing Does not Control in Determining Whether a Shipment is Interstate or Intrastate.
- Sec. 767. Hauling Empty Car Over the State Line Constitutes Interstate Commerce.
- Sec. 768. Car Containing Interstate Traffic Placed on Switching Track for Repairs.
- Sec. 769. Dining Car on Siding Regularly Hauled in Interstate Trains.
- Sec. 770. Transportation of Interstate Traffic for Express Companies.
- Sec. 771. Transportation of Company Property Over State Line is Interstate Commerce.
- Sec. 772. Distinctions Between "Haul" and "Use" of Cars Eliminated by 1903 Amendment.
- Sec. 773. Movement of Cars from Transfer Track to Industrial Track.

(1283)

**§ 752. Scope of Chapter.** The present chapter will be devoted to a discussion of, first, what railroads are subject to the provisions of the Safety Appliance Act, that is, when a common carrier by railroad is engaged in interstate commerce, and, second, when cars are used or employed in moving interstate traffic as distinguished from intrastate commerce. The statute is strictly limited to common carriers by railroad engaged in interstate commerce.

**§ 753. What Constitutes Interstate Commerce with- in Purview of Safety Appliance Act.** Interstate commerce, as that term is used in the Safety Appliance Act, means the transportation of any article of commerce from one state to another. It covers all stages of that transportation from the time of the delivery of the article of commerce to the carrier for shipment to another state and until final delivery to the consignee at the destination point is completed.<sup>1</sup> It includes

1. North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C 159; Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co., 226 U. S. 426, 57 L. Ed. 284, 33 Sup. Ct. 174, 46 L. R. A. (N. S.) 203; United States v. Union Stock Yard & Transit Co. of Chicago, 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83; Delk v. St. Louis & S. F. R. Co., 220 U. S. 580, 55 L. Ed. 590, 31 Sup. Ct. 617; McNeill v. Southern R. Co., 202 U. S. 543, 50 L. Ed. 1142, 26 Sup. Ct. 722; Johnson v. Southern Pac. Co., 196 U. S. 1, 49 L. Ed. 363, 25 Sup. Ct. 158; Hanley v. Kansas City S. R. Co., 187 U. S. 617, 47 L. Ed. 333, 23 Sup. Ct. 214; United States v. Chicago, M. & P. S. Ry. Co., 197 Fed. 624; United States v. Western & A. R. Co., 184 Fed. 336; Erie R. Co. v. Russell, 106 C. C.

A. 160, 183 Fed. 722; Pacific Coast R. Co. v. United States, 98 C. C. A. 31, 173 Fed. 448; Belt R. Co. of Chicago v. United States, 93 C. C. A. 666, 168 Fed. 542, 22 L. R. A. (N. S.) 582; Chicago & N. W. R. Co. v. United States, 93 C. C. A. 450, 168 Fed. 236, 21 L. R. A. (N. S.) 690; Atlantic Coast Line R. Co. v. United States, 94 C. C. A. 35, 168 Fed. 175; Wabash R. Co. v. United States, 93 C. C. A. 393, 168 Fed. 1; United States v. Chicago Great Western Ry. Co., 162 Fed. 775; United States v. Central of Georgia Ry. Co., 157 Fed. 893; United States v. Colorado & N. W. R. Co., 85 C. C. A. 27, 157 Fed. 321, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893; United States v. Chicago, M. & St. P. Ry. Co., 149 Fed. 486; Chicago, M. & St. P. R. Co. v. Voelker, 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264; Barker v. Kanas City, M. &



every carrier who participates in such a movement of commerce no matter for how short a distance as well as every human agency assisting, and every instrumentality used in transporting such commerce.<sup>2</sup>

**§ 754. Railroad Must be a Common Carrier.** The Safety Appliance Act does not apply to any railroad unless it is operated as a common carrier. In this respect the statute is similar to the Federal Employers' Liability Act for both apply to a common carrier by railroad.<sup>3</sup> A common carrier has been defined to be one who undertakes to transport for hire from one place to another passengers or goods of such as choose to employ him, and everyone who undertakes to carry and deliver for compensation, the goods of all persons indifferently, is, as to liability, to be deemed a common carrier.<sup>4</sup>

O. R. Co., 88 Kan. 767, 43 L. R. A. (N. S.) 1121, 129 Pac. 1151; *Breske v. Minneapolis & St. Louis R. Co.*, 115 Minn. 386, 132 N. W. 337.

2. By "interstate commerce" is meant, as you all know, traffic that is moved from one state or territory into or through some other state or territory.—Judge Reed's charge to the jury in *United States v. Chicago G. W. R. Co.*, *supra*.

"Importation into one state from another is the indispensable element in the test of interstate commerce. Every part of every transportation of articles of commerce in a continuous passage from an inception in one state to a prescribed destination in another is a transaction of interstate commerce. Goods so carried never cease to be articles of interstate commerce from the time they are started upon their passage in one state until their delivery at their destination in the other is completed."—Judge Sanborn in *United*

*States v. Colorado & N. W. R. Co.*, *supra*.

"I charge you that when a commodity originating at a point in one state and destined to a point in another state is put aboard a car, and that car begins to move, interstate commerce has begun, and that interstate commerce it continues to be until it reaches its destination."—Charge of Judge Baker, Cir. J., sustained by the Court of Appeals in *Belt Ry. Co. of Chicago v. United States*, *supra*.

3. In re Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44; *Nordgard v. Marysville & N. R. Co.*, 134 C. C. A. 415, 218 Fed. 737; *Bay v. Merrill & Ring Lumber Co.*, 211 Fed. 717.

4. *Norgard v. Marysville & N. R. Co.*, 134 C. C. A. 415, 218 Fed. 737, Judge Ross dissenting on the proposition as to whether the railroad in that case was a common carrier; *United States v.*

**§ 755. Two Requirements as to Interstate Character of Carriers and Cars Prior to 1903 Amendment.** In both suits for penalties and in actions for damages, prior to September 1, 1903 when the act,<sup>5</sup> commonly referred to as the 1903 amendment to the Safety Appliance Act, became effective, the provisions of the Safety Appliance Act did not apply unless it was shown, first, that the carrier was engaged in interstate commerce by railroad, and, second, that the car involved in the litigation was used or hauled in moving interstate traffic. Proof of both these elements was jurisdictional. No liability was therefore incurred, either penal or remedial, because of a failure to have the appliances required by this statute on cars used in hauling intrastate traffic even on the line of a common carrier by railroad engaged in interstate commerce. From the time the original statute became effective in 1898 until the enlargement of the statute hereinafter mentioned by the amendment of 1903, many decisions were delivered defining when a car was used in moving interstate commerce, for this was one of the essential elements in determining the application of the law.<sup>6</sup>

Ramsey, 116 C. C. A. 568, 197 Fed. 144, 42 L. R. A. (N. S.) 1031; Union Stock Yards Company of Omaha v. United States, 94 C. C. A. 626, 169 Fed. 404; United States v. Union Stock Yards of Omaha, 161 Fed. 919; Ft. Worth Belt Ry. Co. v. Perryman, — Tex. Civ. App. —, 158 S. W. 1181. ..

5. 32 Stat. at L. 943, Chap. 976. Appendix G. *infra*.

6. United States v. United States v. Atlantic Coast Line R. Co., 214 Fed. 498; Wheeling Terminal Ry. Co. v. Russell, 126 C. C. A. 519, 209 Fed. 795; Louisville & N. R. Co. v. United States, 108 C. C. A. 326, 186 Fed. 280; Erie R. Co. v. Russell, 106 C. C. A. 160, 183 Fed. 722; Johnson v. Great Northern

R. Co., 102 C. C. A. 89, 178 Fed. 643; Hohenleitner v. Southern Pac. Co., 177 Fed. 796; Norfolk & W. R. Co. v. United States, 101 C. C. A. 249, 177 Fed. 623; Wabash R. Co. v. United States, 93 C. C. A. 393, 168 Fed. 1; United States v. Wheeling & L. E. R. Co., 167 Fed. 198; Chicago, M. & St. P. R. Co. v. United States, 91 C. C. A. 373, 165 Fed. 423, 20 L. R. A. (N. S.) 473; United States v. Northern Pac. Terminal Co., 144 Fed. 861; United States v. Pittsburgh, C. C. & St. L. Ry. Co., 143 Fed. 360; Chicago, M. & St. P. R. Co. v. Voelker, 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. (N. S.) 264; Voelker v. Chicago, M. & St. P. Ry. Co., 116 Fed. 867.

§ 756. **Proof of Use of Car in Moving Interstate Traffic not Essential Since the 1903 Amendment.** But as the amendment of 1903 extended all of the original provisions of the statute to "all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce," the second requirement mentioned in the foregoing paragraph, i. e., the use of a car in moving interstate traffic is not now essential to the application of the statute, for if a carrier by rail is engaged in interstate commerce, then the Safety Appliance Act with all its provisions and amendments and the orders of the Interstate Commerce Commission pursuant thereto, apply to all cars on its line. Whether at the time of the injury or a movement in violation of the statute, the car is used in hauling intrastate or interstate traffic is entirely immaterial so far as the Safety Appliance Act is concerned.<sup>s</sup> It includes

**Alabama.** *Mobile, J. & K. C. R. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395.

**Colorado.** *Felt v. Denver & R. G. R. Co.*, 48 Colo. 249, 21 Ann. Cas. 379, 110 Pac. 215; *Rio Grande Southern R. Co. v. Campbell*, 44 Colo. 1, 96 Pac. 986.

**Delaware.** *Winkler v. Philadelphia & R. R. Co.*, 4 Pennewill's (Del.) 80, 53 Atl. 90.

**Illinois.** *Malott v. Hood*, 201 Ill. 202, 66 N. E. 247; *Lucas v. Peoria & Eastern Ry. Co.*, 171 Ill. App. 1.

**Kansas.** *Thornbro v. Kansas City, M. & O. R. Co.*, 91 Kan. 684, Ann. Cas. 1915D 314, 139 Pac. 410.

7. Section 1 of the Act of March 2, 1903, 32 Stat. at L. 943. Appendix G, *infra*.

8. **United States.** *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. Ed. 874, 36 Sup. Ct. 482; *Great Northern R. Co. v. Otos*, 239 U. S. 349, 60 L. Ed. 322, 36

Sup. Ct. 124; *Southern R. Co. v. Railroad Commission of Indiana*, 236 U. S. 439, 59 L. Ed. 661, 35 Sup. Ct. 304; *Southern R. Co. v. Crockett*, 234 U. S. 725, 58 L. Ed. 1564, 34 Sup. Ct. 897; *Brinkmeier v. Missouri Pac. R. Co.*, 224 U. S. 268, 56 L. Ed. 758, 32 Sup. Ct. 412; *Southern R. Co. v. United States*, 222 U. S. 20, 56 L. Ed. 72, 32 Sup. Ct. 2, 3 N. C. C. A. 822; *Wabash R. Co. v. United States*, 93 C. C. A. 393, 168 Fed. 1; *Elgin J. & E. R. Co. v. United States*, 93 C. C. A. 393, 168 Fed. 1. ..

**Colorado.** *Felt v. Denver & R. G. R. Co.*, 48 Colo. 249, 21 Ann. Cas. 379, 110 Pac. 215.

**Illinois.** *Devine v. Chicago & C. River R. Co.*, 259 Ill. 449, 102 N. E. 803.

**Iowa.** *Stearns v. Chicago, R. I. & P. Ry. Co.*, 166 Iowa 566, 148 N. W. 128.

**Kansas.** *Thornbro v. Kansas City, M. & O. R. Co.*, 91 Kan. 684, Ann. Cas. 1915D 314, 139 Pac. 410.

all cars on highways of interstate commerce by rail. The reader should not be misled by decisions holding that the use of a car in moving interstate commerce is jurisdictional to the application of the statute for these decisions were rendered upon facts happening prior to the 1903 amendment or are erroneous decisions rendered thereafter which were overruled by a controlling decision of the Supreme Court of the United States.<sup>9</sup>

**§ 757. But Use of Car in Moving Interstate Traffic Still Material in Determining Application of Employers' Liability Act.** While the Safety Appliance Act includes all cars used on a railroad engaged in interstate commerce without regard to the kind of commerce hauled in the particular car involved in litigation; yet, in personal injury actions, the use of a car in hauling interstate traffic may become material if the employe, injured through defective appliances contrary to the statute, was working on a car used exclusively in hauling intrastate commerce. His right, in that event, to recover, except in so far as the Safety Appliance Act modifies it, is to be determined solely by the law of the state where the accident occurred.<sup>10</sup> If the employe,

Minnesota. *Burho v. Minneapolis & St. L. R. Co.*, 121 Minn. 326, 141 N. W. 300.

Missouri. *Johnston v. Chicago Great Western R. Co.*, — Mo. App. —, 164 S. W. 260.

Texas. *State v. Orange & N. W. Ry. Co.*, — Tex. Civ. App. —, 181 S. W. 494.

9. *Southern Ry. Co. v. United States*, 222 U. S. 20, 56 L. Ed. 72, 32 Sup. Ct. 2, 3 N. C. C. A. 822.

A few of the decisions which have been overruled by the ruling of the Supreme Court of the United States in *Southern Ry. Co. v. United States*, *supra*, are: *Southern Ry. Co. v. Snyder*, 109 C. A. 344, 187 Fed. 492; *Chicago*

& N. W. Ry. Co. v. United States, 93 C. C. A. 450, 168 Fed. 236, 21 L. R. A. (N. S.) 690; *Winkler v. Philadelphia & R. Ry. Co.*, 4 Pennewill's (Del.) 80, 53 Atl. 90.

10. *Minneapolis, St. P. & S. S. M. R. Co. v. Popplar*, 237 U. S. 369, 59 L. Ed. 1000, 35 Sup. Ct. 609, affirming 121 Minn. 413, 141 N. W. 798, in which Mr. Justice Hughes said: "In the present case a Federal question could arise only under the Safety Appliance Act; while the cars were upon a railroad which was a highway of interstate commerce and hence this Act was applicable (*Southern Railway Co. v. United States*, 222 U. S. 20), it is agreed that there was no evidence that

injured or killed through defective appliances, was at the time engaged solely in intrastate commerce, the law of the state as to the measure of damages, beneficiaries in cases of death, contributory negligence and other like questions of substantive law as well as procedure, must govern. On the other hand, if such employe so killed was engaged in interstate commerce—and this often depends upon whether the defective car was used

the decedent at the time of the accident was engaged in interstate commerce and no question is presented under the Employers' Liability Act, — an enactment which has a wider field. It is apparent that the ruling referred to does not involve the construction of the federal statute or any right, or immunity from liability, which is thereby conferred. The question is *dehors* the statute. True, the state court said that the rule of the Company should be construed in connection with the Safety Appliance Act, but, as the context shows, the court remarked this in pointing out that the statute was designed to prevent the necessity of going between the cars for the purpose of uncoupling them, whether they were standing or moving, and that the only way in which the decedent could uncouple the cars without going between them was to stop the train and walk around to the pin lifter on the other side. In the light of the testimony, the court concluded that it could not be said as matter of law that the decedent in the circumstances was bound to do this. The statute was concerned only in so far as it defined the duty of the Company to have couplers meeting the positive requirement; it

did not preclude the defense of contributory negligence, as distinguished from that of assumption of risk. As this court has said, — 'The defense of contributory negligence was not dealt with by the statute.' *Schlemmer v. Buffalo, Rochester & Pittsburg Rwy. Co.*, 220 U. S. 590, 595. Whether the rule of the Company applied in such an emergency as that in which the decedent found himself, whether he was guilty of contributory negligence as matter of law, or could be excused upon the ground that in an exceptional situation he acted with reasonable care, were questions which the Federal act left untouched. The action fell within the familiar category of cases involving the duty of a master to his servant. This duty is defined by the common law, except as it may be modified by legislation. The Federal statute, in the present case, touched the duty of the master at a single point and, save as provided in the statute, the right of the plaintiff to recover was left to be determined by the law of the State. It cannot be said, from any point of view, that any right or immunity granted by the Act was denied to the plaintiff in error."

in hauling interstate commerce—then the Federal Employers' Liability Act with all of its provisions applies, to the exclusion of all state laws. In that event, contributory negligence is not a defense and assumption of risk is neither a bar nor reduces the damages. The measure of damages, the beneficiaries and other like questions must be determined by the federal statute and not the state law. Whether a car, therefore, is used in moving interstate traffic may become material in remedial actions for violations of the Safety Appliance Act in determining whether other correlative questions of substantive law are regulated by the state or the national government.

**§ 758. Interstate Status of Belt Lines, Terminal Railroads and Stock Yard Companies.** The length of a railroad is entirely non-essential in determining whether it is a carrier engaged in interstate commerce within the meaning of the Safety Appliance Act. Even if confined strictly within the boundaries of a single city or county, a carrier is engaged in interstate commerce if it participates to any extent in the movement of interstate traffic. Belt lines and terminal railroads, therefore, are within the scope of the Safety Appliance Act if they haul any commodities originating at a point in one state and destined to a point in another state for any distance during the course of the transportation.<sup>11</sup> In *Belt Ry. Co. of Chicago v. United States*,

11. *Union Stockyards Co. of Omaha, v. United States*, 94 C. C. A. 626, 169 Fed. 404; *Belt R. Co. of Chicago v. United States*, 93 C. C. A. 666, 168 Fed. 542; *Pacific Coast R. Co. v. United States*, 98 C. C. A. 31, 173 Fed. 448; *United States v. Chicago Great Western Ry. Co.*, 162 Fed. 775.

"The fact that the cars in question were at the time carrying a commodity that had been ship-

ped from one state into, or through, another, demonstrates the event, however, that it was then engaged in moving interstate traffic. The cardinal purpose of the terminal company is to facilitate the transfer of these cars as among the three lines of railway centering in the former's yards. If the car is being used by any of these lines for the transportation of interstate traffic, and its destination is to pass

cited, an assignment of error presented was that the trial court erred in giving the following instruction: "The question therefore presents itself, and it is a legal question, was the Belt Company, at the time it moved this string of 42 freight cars, containing a car originating in Illinois and destined to Wisconsin, engaged in interstate commerce? I charge you that when a commodity originating at a point in one state and destined to a point in another state is put aboard a car, and that car begins to move, interstate commerce has begun, and that interstate commerce it continues to be until it reaches its destination. If, between the point of origin of this commodity and the point of destination of this commodity, the car in which it is being vehicled from origin to destination passes over a line of track wholly within a city, within a county, or within a state, the railway company operating that line of track while moving this commodity, so originating and destined from one point to another point, intrastate, is engaged in interstate commerce." The Circuit Court of Appeals held that the charge properly declared the law in determining whether terminal railroads were engaged in interstate commerce within the meaning of the Safety Appliance Act. In another case,<sup>12</sup> it was contended by the defendant, the owner of about thirty-five miles of railroad tracks used in connection with its stockyards at South Omaha, Neb., that it was not a common carrier within the meaning of the Safety Appliance Act, but the court properly held to the contrary, and said: "The defendant contends that it is not subject to the acts of Congress relating to safety appliances, approved March 2, 1893, c. 196, 27 Stat. 531, amended April 1, 1896, c.

from one line to the other, it must pass through the yards of the terminal company and be hauled by it. When, therefore, the terminal company is engaged in effecting a transfer of one of these cars from one line of railway to another, it is itself en-

gaged in hauling a car used in moving interstate traffic." United States Northern Pac. Terminal Co., 144 Fed. 861.

12. United States v. Union Stock Yards Co. of Omaha, 161. Fed. 919.

87, 29 Stat. 85, and March 2, 1903, c. 976, 32 Stat. 943, for the reason that it is not a common carrier, and is not engaged in interstate commerce by railroad. It may be questioned whether a railroad company must be a common carrier in order to bring it within these acts, since the amendment approved March 2, 1903, makes the provisions and requirements of that amendatory act, as well as of the original act as amended, apply to all 'cars and similar vehicles used on any railroad engaged in interstate commerce.' A railroad has been defined as a road or way on which iron rails are laid for wheels to run on for the conveyance of heavy loads and vehicles. *Dinsmore v. Racine M. R. Co.*, 12 Wis. 649. Such a track is a railroad independently of the use made of the track in the hauling of cars over it, as was pointed out in *L. S. & M. R. Co. v. U. S.*, 93 U. S. 442, 23 L. Ed. 965. In this case the road is not a mere switch maintained for the private purpose of the defendant, nor are cars delivered to the consignees when they are set upon the transfer track, and therefore an essential part of the transportation of the cars and freight therein contained is unfinished. Over the 35 miles of track of the defendant is hauled all the live stock consigned to commission agents and others who supply the five meat packing houses of South Omaha, one of the greatest centers of that industry in the United States. All the products of the packing houses are hauled away over this road as the initial carrier, in the routes to the destination of such products. In addition, the defendant road operates as a connecting carrier between all the 8 or 10 trunk line railroads entering South Omaha, and transfers cars from any road to any other road upon request. For instance, cars that may be consigned from shippers in Colorado or Dakota to consignees in Missouri or Illinois are regularly switched over the defendant's railway from one carrier to another as a part of the interstate transportation of the freight in such cars, the defendant using its own engine and servants in hauling such cars. The defendant also re-



ceives freight for other industries upon its lines. The live stock hauled over the defendant's road amounts to about 625 cars per day. The defendant has not built nor maintained its railway as a private track for its own use, but has devoted it to a public use. Not only is this true of the greater portion of the track, but it is especially true of the transfer track. That track is used by all the railway companies entering South Omaha as a track upon which to switch cars. This transfer track is undoubtedly a railroad, and the defendant hauled the cars in question over a portion of this track. If the methods adopted by the defendant relieve it from the obligations of a common carrier by railroad, no reason is perceived why subsidiary companies could not own the switch yards or belt railroads of each city or village, and by the device of making all deliveries upon a transfer track monopolize the carriage of all freight traffic between the main line railroads and the shippers and consignees in such city or village, and thus escape the obligation of common carriers. The defendant, having chosen to devote its railroad tracks to a public use, must be held to be a common carrier."

**§ 759. Railroad Wholly Within State Transporting Freight in Continuous Shipment Without Traffic Agreement with Other Carriers.** A carrier with a line of railroad wholly within a single state which receives freight from another railroad or carrier in a continuous passage from points without the state and transports it to stations on its own line, is a common carrier engaged in interstate commerce within the purview of the Safety Appliance Act.<sup>13</sup> The interstate character of its

13. Baer Bros. Mercantile Co. v. Denver & R. G. R. Co., 233 U. S. 479, 58 L. Ed. 1055, 34 Sup. Ct. 641; United States ex rel. Attorney General v. Union Stockyard & Transit Co. of Chicago 192 Fed. 330; St. Joseph Stockyards Co. v. United States, 110 C. C. A.

432, 187 Fed. 104; Pacific Coast R. Co. v. United States, 98 C. C. A. 31, 173 Fed. 448; United States v. Union Stockyards Co. of Omaha, 94 C. C. A. 626, 169 Fed. 404; Belt R. Co. of Chicago v. United States, 93 C. C. A. 666, 168 Fed. 542, 22 L. R. A. (N. S.)

employment, in such cases, is not destroyed because it accepts such shipments free from any common control, management or arrangement with the other carrier for a continuous passage, nor does the fact that its line is a narrow-gauge so that the goods received by it must be unloaded and transferred from the cars of the other carrier alter its interstate status. That the shipments are not carried on through bills of lading but are rebilled from its connecting terminus with the other carrier over its own line, does not affect their interstate nature if, in fact, the freight is consigned and transported in a continuous passage from without the state to a point on its line.

**§ 760. Foregoing Principle Illustrated and Applied in Adjudicated Cases.** The rule announced in the preceding paragraph was applied and the carriers were found guilty of violating the Safety Appliance Act, under the following circumstances: A narrow-gauge railroad confined wholly within the state of Colorado accepted at its connecting terminus with a standard-gauge railroad at Boulder, Colorado, a shipment consigned from Omaha, Nebraska, to a consignee at Sugar Loaf, Colorado, a station on its line, and another shipment from Kansas City, Missouri, consigned to a merchant at Ward, Colorado, another station on its line. Neither of these shipments were carried on through bills of lading but on strictly local bills (between two points in the same state) on the narrow-gauge line, but

582; *Chicago, M & St. P. R. v. United States*, 91 C. C. A. 373, 165 Fed. 423, 20 L. R. A. (N. S.) 473; *United States v. Union Stock Yards Co. of Omaha*, 161 Fed. 919; *United States v. Colorado & N. W. R. Co.*, 85 C. C. A. 48, 157 Fed. 342; *United States v. Colorado & N. W. R. Co.*, 85 C. C. A. 27, 157 Fed. 321 15 L. R. A. (N. S.) 167; *United States v. Northern Pac. Terminal Co.*, 144 Fed.

861; *United States v. Chicago, P. & St. L. Ry. Co.*, 143 Fed. 353. *Contra*: *United States v. Geddes*, 65 C. C. A. 320, 131 Fed. 452; *Interstate Commerce Commission v. Bellaire, Z & C. Ry. Co.*, 77 Fed. 942; *United States ex rel Interstate Commerce Commission v. Chicago, K. & S. R. Co.*, 81 Fed. 783; *Ex Parte Koehler, Receiver etc.* 30 Fed. 867.

at Boulder the narrow-gauge line advanced the freight charges for the previous transportation and collected the entire charges at destination points. There was no evidence of common management or control between the narrow-gauge line and the other carriers for a continuous shipment of the freight. Under these facts, it was held that the narrow-gauge line was engaged in interstate commerce so that its cars and engine were required to be equipped with automatic couplers.<sup>14</sup> In

14. *United States v. Colorado & N. W. R. Co.*, 85 C. C. A. 27, 157 Fed. 321, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893, a leading opinion by Sanborn, J., in which, in part, he said: "In the case at bar the consigners shipped the goods to their prescribed destinations in Colorado when they started them from Kansas City and Omaha, respectively, and they never rebilled nor changed the destinations. The goods went in continuous passages from the origins of their transportation in eastern states to their final destinations upon the line of the Northwestern Company in Colorado. The rebilling practiced by the railroad companies without any new consent or contracts with the owners could not destroy or affect the interstate character of the shipments or of the transportation. The Northwestern Company was a common carrier; it transported from Boulder, Colo., to their prescribed destinations in that state, articles of interstate commerce consigned from cities in Missouri and Nebraska, respectively, upon continuous passages, to their designated destinations in Colorado. Each of these transportations from the respective points in Missouri and Nebraska to the places of consign-

ment of the goods in Colorado was a single interstate carriage and transaction, and the Northwestern Company, by reason of its transportation of these and like shipments through a part of their interstate carriage, necessarily became a 'common carrier engaged in interstate commerce by railroads,' and thus fell within the literal terms and the ordinary meaning of the provision of the safety appliance acts, which declared that it shall be unlawful for 'any common carrier engaged in interstate commerce by railroad to haul cars used in moving interstate traffic unequipped with automatic couplers. \* \* \* No words or terms in the English language occur to us which could express with more clearness and certainty, than those embodied in this statute, the requirement that every common carrier engaged in interstate commerce by railroad shall equip the cars it uses to move interstate traffic, and that are not expressly excepted by the sixth section of the act, with automatic couplers. And if the Congress 'should be intended to mean what they have plainly expressed,' they must have meant that no common carrier engaged in such commerce by railroad, whether its railroad was long or

another case a railway situated entirely within two counties in California, received from the Southern Pacific Company freight consigned from points in eastern states, some of which was billed from the point of shipment to point of destination on its line while the other shipments were billed to a terminal point on the line of the Southern Pacific Company to the shipper's order and before arrival at that point the shipper arranged with the Southern Pacific Company to forward the freight to the stations along the line of the short railroad in question. No cars of the Southern Pacific Company passed over its line as it was a narrow-gauge and all freight was transferred and rebilled. The shippers had no contractual relation with the narrow-gauge line. The court held, under these facts, that the carrier was engaged in interstate commerce and was subject to the Safety Appliance statute.<sup>15</sup>

**§ 761. Interurban Electric Railroads Participating in Movement of Interstate Traffic.** The Safety Appliance Act as amended in 1903 applies to interurban electric railroads engaged in interstate commerce, as well as steam railroads.<sup>16</sup> "It is insisted that Campbell's train was not such as the Safety Appliance Acts require to be equipped with air brakes. In *Spokane & I. E. R. R. Co. v. United States*, decided June 5, 1916, *ante*, p. 344, we held that this same railroad, with respect to its interurban traffic, is subject to the provisions of those Acts respecting automatic couplers,

short, whether it was within one or many states, whether it was engaged much or little in that commerce, and whether it operated independently or under a common control, management, or arrangement with some other carrier, could lawfully move interstate traffic in its cars without first equipping them with automatic couplers, for so the Congress plainly enacted. This view of the effect of this legislation

is not without authoritative support."

15. *Pacific Coast R. Co. v. United States*, 98 C. C. A. 31, 173 Fed. 448.

16. *Spokane & I. E. R. Co. v. United States*, 241 U. S. 344, 60 L. Ed. 1037. 36 Sup. Ct. 668; *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. Ed. 1125, 36 Sup. Ct. 683, 12 N. C. C. A. 1083; *United States v. Spokane & I. E. R. Co.*, 206 Fed. 988.

and handholds or grab-iron at the ends of the cars. In that case the particular reliance of the company was upon the concluding clause of the first section of the 1903 amendment (32 Stat. 943), which excepts trains, cars, etc., 'which are used upon street railways.' In the present case a distinction is sought to be drawn between steam and electric roads, the argument being that the provision requiring power brakes, when read in connection with the context, indicates that trains drawn by steam locomotives and operated by a locomotive engineer were alone within the contemplation of Congress. It is true that in the Act of 1893 the provision was closely associated with the mention of a locomotive engine as the motive power; the words of section 1 being: 'It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic (after a specified date) that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.' Section 6, prescribing penalties, also uses the words 'locomotive engine' and 'locomotives.' But the 1903 amendment, which, as frequently pointed out, was enacted for the purpose of enlarging the scope of the Act (*Southern Ry. v. United States*, 222 U. S. 20, 26; *Southern Ry. v. Crockett*, 234 U. S. 725, 735), in its first section declares that the provisions relating to train brakes (among others) shall be held to apply to 'all trains, locomotives, tenders, cars, *and similar vehicles* used on any railroad engaged in interstate commerce . . . and to all other locomotives, tenders, cars, *and similar vehicles* used in connection therewith,' subject to exceptions not now pertinent. The second section declares that whenever any train is operated with power or train brakes, 'not less than fifty per centum of the cars of such train shall have their brakes used and operated by the

engineer of the locomotive drawing such train.' Of course, an important object of having a train equipped with a system of brakes under the single control of the engineer is to permit of a prompt and effective reduction of speed when the man driving the train is notified of danger. The importance of this is precisely the same whatever be the motive power, and, in view of the beneficial purpose of the Act and the evident intent of Congress to enlarge its scope so far as necessary to guard against the dangers in view, the term 'similar vehicles' must be held to have the effect of bringing electric motors and trains drawn by brakes. The very exemption of trains, cars, and locomotives 'used upon street railways' indicates that electric cars were in contemplation".<sup>17</sup>

**§ 762. Industrial Railroads Forming Connecting Link for Interstate Transportation.** Every part of the transportation of goods in a continuous passage from one state to a designed point in another state is interstate commerce, and every common carrier that participates in the transportation of such goods is engaged in interstate commerce, even though the particular part of the transportation of a carrier is wholly within one state.<sup>18</sup> An industrial railroad, therefore, performing transportation service as a common carrier for a steel plant by hauling cars loaded with interstate freight from the tracks of the trunk lines to a foundry, is engaged in interstate commerce within the meaning of the Safety Appliance Act.<sup>19</sup>

**§ 763. Transportation from One Point to Another in Same State Passing in Transit Through Another State.** Merchandise consigned and transported from

17. *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. Ed. 1125, 36 Sup. Ct. 683, 12 N. C. C. A. 1083.

18. *United States v. Colorado & N. W. R. Co.*, 85 C. C. A. 27, 157 Fed. 321, 15 L. R. A. (N. S.)

167, 13 Ann. Cas. 893; *United States v. Southern Ry. Co.*, 135 Fed. 122.

19. *Devine v. Chicago & C. River R. Co.*, 259 Ill. 449, 102 N. E. 803.

one point to another in the same state, but passing in transit through a portion of another contiguous state, constitutes interstate commerce, and a carrier so employed is subject to the provisions of the statute.<sup>20</sup> Formerly this rule was vigorously attacked and its authority denied by many state courts and some federal courts, but the interstate character of such shipments was finally established by the United States Supreme Court in the case cited,<sup>21</sup> and has since been adhered to.<sup>22</sup>

**§ 764. All Cars Hauled in Interstate Trains Impressed with Interstate Character.** A train containing a single shipment from one state to another is an interstate train so that all employes thereon are engaged in interstate commerce, and it then necessarily follows that the carrier is also engaged in interstate commerce. The test in determining whether employes are engaged in interstate commerce is not whether the major part of the freight in a train constitutes interstate traffic. A single shipment of interstate commerce impresses the entire train with an interstate character so that the employes as well as the cars are subject to national laws.<sup>23</sup> Cars, therefore, loaded with freight and billed even from one point to another in the same state, if hauled in a train containing any interstate traffic, are

20. *Louisville & N. R. Co. v. Allen*, 152 Ky. 145, 153 S. W. 198; *Deardorff v. Chicago, B. & Q. R. Co.*, 263 Mo. 65, 172 S. W. 333.

21. *Hanley v. Kansas City S. R. Co.*, 187 U. S. 617, 47 L. Ed. 333, 23 Sup. Ct. 214. *Contra*: *Campbell v. Chicago, M. & St. P. Ry. Co.*, 86 Ia. 641, 53 N. W. 323; *Seawell v. Kansas City, Ft. S. & M. R. Co.*, 119 Mo. 222, 24 S. W. 1002.

22. *United States v. Erie R. Co.*, 166 Fed. 352; *United States v. Chicago Great Western Ry. Co.*,

162 Fed. 775; *Trimble, J., in Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131: "The conceded facts show that the shipment (between two points in Missouri) for a portion of the way, went into the state of Kansas, going through several towns therein, at one of which the hogs were unloaded and fed. The shipment, therefore, was an interstate shipment."

23. *Norfolk & W. R. Co. v. United States*, 101 C. C. A. 249, 177 Fed. 623.

used in interstate commerce with the purview of the provisions of the Safety Appliance Act.<sup>24</sup>

**§ 765. Switching of Car From One Yard to Another Preparatory for Interstate Trip.** A car containing freight switched by a railroad company from one yard to another in the same state for the purpose of putting it into a train destined to a point in another state, is, while being so moved from one yard to the other, used in moving interstate traffic. The switching movement, under such circumstances, is just as much a part of the interstate trip as the subsequent hauling in a train on the main line because interstate transportation begins from the time a car loaded with freight for another state commences to move at the point of origin.<sup>25</sup>

24. *Southern R. Co. v. Snyder*, 109 C. C. A. 344, 187 Fed. 492; *Erie R. Co. v. Russell*, 106 C. C. A. 160, 183 Fed. 722; *United States v. Baltimore & O. R. Co.*, 170 Fed. 456; *United States v. Wheeling & L. E. R. Co.*, 167 Fed. 198; *Chicago, M. & St. P. R. Co. v. United States*, 91 C. C. A. 373, 165 Fed. 423; *United States v. St. Louis, I. M. & S. R. Co.* 154 Fed. 516; *Breske v. Minneapolis & St. Louis R. Co.*, 115 Minn. 386, 132 N. W. 337.

"A train composed of cars, some of which are and some of which are not engaged in interstate traffic, is subject to the regulation of Congress. A railway company cannot escape liability by mixing in the same train cars engaged in interstate traffic with cars engaged in intrastate traffic. All the cars in such a train must be provided with the automatic couplers and grab irons required by the act of March 2, 1893, for every such car is in fact 'used

in moving interstate traffic.'" *United States v. Erie R. Co.*, 166 Fed. 352.

25. *Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co.*, 226 U. S. 426, 57 L. Ed. 284, 33 Sup. Ct. 174, 46 L. R. A. (N. S.) 203; *United States v. Union Stock Yards & Transit Co.*, of Chicago, 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83; *McNeill v. Southern R. Co.*, 202 U. S. 543, 50 L. Ed. 1142, 26 Sup. Ct. 722; *United States v. Atlantic Coast Line R. Co.*, 214 Fed. 498; *United States v. Pere Marquette R. Co.*, 211 Fed. 220; *United States v. Grand Trunk Ry. Co. of Canada*, 203 Fed. 775; *Atchison, T. & S. F. R. Co. v. United States*, 117 C. C. A. 341, 198 Fed. 637; *Belt R. Co. of Chicago v. United States*, 93 C. C. A. 666, 168 Fed. 542, 22 L. R. A. (N. S.) 582; *United States v. Pittsburgh, C. C. & St. L. Ry. Co.*, 143 Fed. 360; *Mobile, J. & K. C. R. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395.



**§ 766. Re-billing Does not Control in Determining Whether a Shipment is Interstate or Intrastate.** If a continuous movement of a shipment from a point in one state to a point in another is intended by the consignor, then the transportation thereon constitutes interstate commerce from point of origin to point of destination, and the mere billing of the freight between two points in the same state is not decisive or controlling in determining its character. As well stated by Judge Nortoni in the case cited:<sup>26</sup> "The court pays but slight heed to the billing in matters of this character because of the opportunity for the practice of subterfuge which attends it and looks rather to the substance of the transaction as by inquiry touching the intention of the parties to transport the goods into a foreign state or country through continuity of movement which attends or is contemplated in the transaction. Therefore, it is said that the shipment takes on the character of either intrastate or interstate commerce at the point the shipment is started. The rule reflected in the authorities is that if, through continuity of movement the goods are destined at the time they are started for a point in another state, the shipment is to be regarded as interstate commerce, and therefore falling within the purview of the interstate statutes in respect of rates rather than intrastate, though the billing when looked to alone may suggest the latter."<sup>27</sup>

**§ 767. Hauling Empty Car Over the State Line Constitutes Interstate commerce.** The transportation of an empty car from one state to another,<sup>28</sup> or between

26. *Louis Werneg Saw Mill Co. v. Kansas City Southern Ry. Co.*, — Mo. App. —, 186 S. W. 1118.

27. The court cited the cases of *Railroad Commission of Louisiana v. Texas & P. R. Co.*, 229 U. S. 336, 57 L. Ed. 1215, 33 Sup. Ct. 837; *Texas & N. O. R.*

*Co. v. Sabine Tram Co.*, 227 U. S. 111, 57 L. Ed. 442, 33 Sup. Ct. 229.

28. *North Carolina R. Co. v. Zachary* 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A. 109, *Ahn. Cas.* 1914C 159; *United States v. Chicago, M. & St. P. Ry. Co.*, 149 Fed. 486; *Voelker*

two points in the same state in a train carrying any interstate commerce,<sup>29</sup> or to a point in the same state for the purpose of loading with interstate commerce,<sup>30</sup> is a use of a car in interstate commerce.

**§ 768. Car Containing Interstate Traffic Placed on Switching Track for Repairs.** A car containing merchandise consigned from a point in one state to a point in another, is still used in interstate commerce within the purview of Section 2 of the original act requiring automatic couplers, although placed upon a switching track for repairs during the transit.<sup>31</sup> Said the court, in the case cited: "The defendant argues that the car had been withdrawn from interstate commerce, and that therefore the act of March 2, 1893, chap. 196, sec. 2, 27 Stat. at L. 531, Comp. Stat. 1913, sec. 8606, does not apply; that if it does apply, the defendant was required by that act and the supplementary act of April 14, 1910, chap. 160, 36 Stat. at L. 298, Comp. Stat.

v. Chicago, M. & St. P. Ry. Co., 116 Fed. 867; Kansas City Southern R. Co. v. Cook, 100 Ark. 467, 140 S. W. 579; Barker v. Kansas City, M. & O. R. Co., 88 Kan. 767, 43 L. R. A. (N. S.) 1121 129 Pac. 1151; Thompson v. Wabash R. Co., 262 Mo. 468, 171 S. W. 364.

29. United States v. Baltimore & O. R. Co., 170 Fed. 456; United States v. Wheeling & L. E. R. Co., 167 Fed. 198; Chicago, M. & St. P. Ry. Co. v. United States, 91 C. C. A. 373, 165 Fed. 423, 20 L. R. A. (N. S.) 473; United States v. Louisville & N. R. Co., 162 Fed. 185; United States v. Chicago & N. W. Ry. Co., 157 Fed. 616; United States v. St. Louis, I. M. & S. R. Co., 154 Fed. 516; United States v. Northern Pac. Terminal Co., 144 Fed. 861; Voelker v. Chicago, M. & St. P. Ry. Co., 116 Fed. 867.

30. Johnson v. Southern Pac. Co., 196 U. S. 1, 49 L. Ed. 363, 25 Sup. Ct. 158; Chicago & N. W. R. Co. v. United States, 93 C. C. A. 450, 168 Fed. 236, 21 L. R. A. (N. S.) 690; Breske v. Minneapolis & St. Louis R. Co., 115 Minn. 386, 132 N. W. 337.

31. Great Northern R. Co. v. Otos, 239 U. S. 349, 60 L. Ed. 322, 36 Sup. Ct. 124. To the same effect: Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. Ed. 173, 32 Sup. Ct. 79; Delk v. St. Louis & S. F. R. Co., 220 U. S. 580, 55 L. Ed. 590, 31 Sup. Ct. 617; Gray v. Louisville & N. R. Co., 197 Fed. 874; Erie R. Co. v. Russell, 106 C. C. A. 160, 183 Fed. 722; St. Louis & S. F. R. Co. v. Conarty, 106 Ark. 421, 155 S. W. 93; Lorick v. Seaboard Air Line Ry. 102 S. C. 276, Ann. Cas. 1917D 920, 86 S. E. 675.

1913, sec. 8617, to remove the car for repairs and that its effort to comply with the statutes could not constitute a tort; and that the plaintiff was a person intrusted by it with the details of the removal, and could not make it responsible for the mode in which its duty was carried out; that he might have detached the car while it was at rest. But we are of opinion that the argument cannot prevail. The car was loaded and in fact was carried to Minneapolis the next day. It had not been withdrawn from interstate commerce, but merely subjected to a delay in carrying it to its destination. At the moment of the accident it was accessory to switching the Duluth car. It does not seem to us to need extended argument to show that the car still was subject to the act of Congress."

**§ 769. Dining Car on Siding Regularly Hauled in Interstate Trains.** A dining car constantly used on interstate trains taken out of a passenger train at a station between terminals for the purpose of being picked up a few hours thereafter by another interstate train going in the opposite direction, is, while being switched in the yard for the purpose of turning it around preparatory for the next train, used in interstate traffic within the meaning of the statute. That the car was not being put into the interstate train or was not actually engaged in interstate commerce at the time of the switching movement, did not have the effect of withdrawing it from use in moving interstate traffic when it was only temporarily stopped in making trips between two points in different states. "Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was clearly so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic, and so within the law."<sup>32</sup>

32. *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363, 25 Sup. Ct. 158.

**§ 770. Transportation of Interstate Traffic for Express Companies.** The transportation of articles of merchandise for an independent express company under a contract by virtue of which the express company pays to the railroad company a certain per cent of its gross receipts, constitutes interstate commerce although the railroad company did not issue a bill of lading, handle or deliver the merchandise.<sup>33</sup>

**§ 771. Transportation of Company Property Over State Line is Interstate Commerce.** A common carrier hauling its own property from a point in one state to a point in another is thereby engaged in interstate commerce, for interstate traffic may as well consist of the property of the carrier as of the property of a merchant.<sup>34</sup>

**§ 772. Distinctions between "Haul" and "Use" of Cars Eliminated by 1903 Amendment.** The original Safety Appliance Act prohibited the "use" of any car in interstate commerce not provided with grabirons or handholds, and Section 2 prohibited a carrier from "hauling," or permitting "to be hauled," or "used" on its line, any car in moving interstate commerce without the prescribed couplers. Whatever distinction existed between these terms in the application and enforcement of the statute<sup>35</sup> has, by the amendment of 1903, been

33. *United States v. Colorado & N. W. R. Co.*, 85 C. C. A. 27, 157 Fed. 321, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893.

34. *Chicago, M. & St. P. R. Co. v. United States*, 91 C. C. A. 373, 165 Fed 423, 20 L. R. A. (N. S.) 473; *United States v. Chicago & N. W. Ry. Co.*, 157 Fed. 616; *Johnston v. Chicago Great Western R. Co.*, — Mo. App. —, 164 S. W. 260.

35. "The statute forbids hauling and using. Why were both words used? If the car was

fully loaded and on the track ready to be started as a part of an interstate train, with engine attached and fired, and requiring only the touch of the engineer to start, would not the car be "used" or in use, within the statute, before it was hauled? If it was without the automatic coupler, so that the brakeman would have to go between the cars to couple them, it would clearly be within the mischief the statute was intended to prevent. 'Used' has other meanings than 'hauled.' It

entirely obliterated for the statute applies to any "use" of a car on a railroad engaged in interstate commerce. This term includes the employment of a car whether moving, or being hauled, or standing on a track to be loaded, or on a repair track to be repaired, subject, of course, to the exceptions created by Section 4 of the 1910 Amendment. The term is broad enough to include any employment of a car for any purpose in railroad service.<sup>36</sup>

**§ 773. Movement of Cars From Transfer Track to Industrial Track.** The switching of a car by a railroad sompany, placed on its transfer by another carrier for a short distance to an industrial track—the movement being the last lap of an interstate journey—constituted a use in interstate commerce as the interstate character of the shipment did not cease until final delivery to the consignee on the industrial switch.<sup>37</sup>

is a broader word. To haul is to use, but may not a car be used within the statutory meaning otherwise than by being hauled?" United States v. St. Louis, Southwestern R. Co. of Texas, 106 C. C. A. 230, 184 Fed. 28.

36. United States v. Spokane & I. E. R. Co., 206 Fed. 988.

37. Chicago, M. & St. P. R. Co. v. United States, 91 C. C. A. 373, 165 Fed 423, 20 L. R. A. (N. S.) 473.

## CHAPTER XLII.

### BASIS, NATURE AND EXTENT OF LIABILITY UNDER SAFETY APPLIANCE ACT.

- Sec. 774. Disregard of Requirements of Statute Negligence Per Se.
- Sec. 775. Statute Imposes Absolute and Unqualified Duty to Maintain Appliances in Secure Condition.
- Sec. 776. Substitutes for Appliances Required by Safety Appliance Act not Lawful.
- Sec. 777. Duty of Carrier in Personal Injury Suits as Broad as in Actions for Penalties.
- Sec. 778. Remedial Features of the Statute Apply to Movements of Cars Solely for Repairs.
- Sec. 779. Doctrine of *Siegel v. New York Cent. & H. River R. Co.*, and Like Cases, Overruled.
- Sec. 780. Duties Imposed by Statute in One Relation not Actionable in Another.
- Sec. 781. Proof of Knowledge of Defect Not an Element of Violation of Statute.
- Sec. 782. Use of Care and Diligence in Discovering and Repairing Defects, No Defense.
- Sec. 783. Proof of Negligence under Liability Act not Required if Injury was Due to Violation of Safety Appliance Act.
- Sec. 784. Same Subject—*Taylor v. St. Louis, I. M. & S. Ry. Co.*
- Sec. 785. When Employee's Negligence is Sole Cause of Injury, No Recovery Permitted.
- Sec. 786. Duties Imposed by Statute Cannot be Evaded by Contract.
- Sec. 787. Inconvenience and Impracticability of Statutory Requirements Will not Excuse Violation.
- Sec. 788. Appliances Required by Statute must be Operative.
- Sec. 789. Failure of Employee to Operate Appliance Capable of Being Operated, no Offense.
- Sec. 790. Deliberate Act of Employee in Causing Appliance to become Defective, no Defense.
- Sec. 791. Duties Placed upon Carrier by Statute Cannot be Evaded by Assignment.
- Sec. 792. Railroad Liable for Condition of Foreign Cars.
- Sec. 793. Carriers may Refuse Defective Cars from Connecting Lines.
- Sec. 794. Defective Equipment Must be Proximate Cause of Injury.
- Sec. 795. Question of Proximate Cause Ordinarily for the Jury.

**§ 774. Disregard of Requirements of Statute Negligence Per Se.** A violation of any of the provisions of the statute by a common carrier by railroad engaged  
(1306)

in interstate commerce constitutes negligence per se,<sup>1</sup> and where a disregard of the command of the statute results in damage to any one of the class for whose

1. **United States.** Illinois Cent. R. Co. v. Williams, 242 U. S. 462, 61 L. Ed. 437, 37 Sup. Ct. 128; Atlantic City R. Co. v. Parker, 242 U. S. 56, 61 L. Ed. 150, 37 Sup. Ct. 69; San Antonio & A. P. R. Co. v. Wagner, 241 U. S. 476, 60 L. Ed. 1110, 36 Sup. Ct. 626; Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 317, 57 L. Ed. 1204, 33 Sup. Ct. 840, 3 N. C. C. 826; Southern R. Co. v. Carson, 194 U. S. 136, 48 L. Ed. 907, 24 Sup. Ct. 609; Smith v. Atlantic Coast Line R. Co., 127 C. C. A. 311, 210 Fed. 761; Campbell v. Spokane & I. E. R. Co., 188 Fed. 516; Donegan v. Baltimore & N. Y. R. Co., 91 C. C. A. 555, 165 Fed. 869.

**Delaware.** Philadelphia & R. R. Co. v. Winkler, 4 Pennewill's (Del.) 387, 56 Atl. 112.

**Georgia.** Louisville & N. R. Co. v. Layton, 145 Ga. 886, 90 S. E. 53; Austin v. Central of Georgia R. Co., 3 Ga. App. 775, 61 S. E. 998.

**Illinois.** Luken v. Lake Shore & M. S. Ry. Co., 248 Ill. 377, 140 Am. St. Rep. 220, 21 Ann. Cas. 82, 94 N. E. 175.

**Indiana.** Grand Trunk Western R. Co. v. Poole, 175 Ind. 567, 93 N. E. 26.

**Iowa.** Cook v. Union Pac. R. Co., — Iowa —, 158 N. W. 521; Stearns v. Chicago, R. I. & P. R. Co., 166 Iowa 566, 148 N. W. 128.

**Kentucky.** Nashville, C. & St. L. Ry. Co. v. Henry, 158 Ky. 88, 164 S. W. 310.

**Minnesota.** Davis v. Minneapolis & St. L. R. Co., 134 Minn. 455, 159 N. W. 802; Cramer v. Chicago M. & St. P. R. Co., 134 Minn. 61, 158 N. W. 796; Hurley v. Illinois Cent. R. Co., 133 Minn. 101, 157 N. W. 1005; LaMere v. Railway Transfer Co. of the City of Minneapolis, 125 Minn. 159, Ann. Cas. 1915C 607, 145 N. W. 1068; Willett v. Illinois Cent. R. Co., 122 Minn. 513, 4 N. C. C. A. 479, 142 N. W. 883; Burho v. Minneapolis & St. L. R. Co., 121 Minn. 326, 141 N. W. 300.

**Missouri.** Christy v. Wabash R. Co., 195 Mo. App. 232, 191 S. W. 241; Moore v. St. Joseph & G. I. R. Co., 268 Mo. 31, 186 S. W. 1035; Shohoney v. Quincy, O. & K. C. R. Co., 223 Mo. 649, 122 S. W. 1025.

**North Carolina.** Montgomery v. Carolina & N. W. R. Co., 163 N. C. 597, 80 S. E. 83; Elmore v. Seaboard Air Line Ry. Co., 130 N. C. 506, 41 S. E. 786; Troxler v. Southern Ry. Co., 124 N. C. 189, 44 L. R. A. 313, 70 Am. St. Rep. 580, 32 S. E. 550.

**Oklahoma.** Chicago, R. I. & P. Ry. Co. v. Ray, — Okla. —, 168 Pac. 999.

**South Carolina.** Carson v. Southern Ry., 68 S. C. 55, 46 S. E. 525.

**South Dakota.** Fletcher v. South Dakota Cent. R. Co., 36 S. D. 401, 155 N. W. 3.

**Texas.** Texas & P. Ry. Co. v. Sherer, — Tex. Civ. App. —, 183 S. W. 404; San Antonio & A. P. Ry. Co. v. Wagner, — Tex. Civ. App. —, 166 S. W.

special benefit the act was enacted, the right to recover damages is implied.<sup>2</sup> "The title of the act, repeated in that of each supplement, is general: 'An act to promote the safety of employees and travelers,' etc.; and in the proviso to section 4 of the supplement of 1910 there is a reservation as to 'liability in any remedial action for the death or injury of any railroad employe.' None of the Acts, indeed, contains express language conferring a right of action for the death or injury of an employee; but the safety of employees and travelers is their principal object, and the right of private action by an injured employee, even without the Employers' Liability Act, has never been doubted. (See *Johnson v. Southern Pacific Co.*, 196 U. S. 1; *Schlemmer v. Buffalo, Rochester, etc., Ry.*, 205 U. S. 1, 8; 220 U. S. 590, 592; *St. Louis & Iron Mountain Ry. v. Taylor*, 210 U. S. 281, 284, 295; *Delk v. St. Louise & San Francisco R. R.*, 220 U. S. 580; *Cleveland etc., Ry. v. Baker*, 91 Fed. Rep. 224; *Denver & R. G. R. R. v. Arright*, 129 Fed. Rep. 347; *Chicago, etc., Ry. v. Voelker*, 129 Fed. Rep. 522; *Chicago Junction Ry. v. King*, 169 Fed. Rep. 372). A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed in 1 Com. Dig. tit. Action upon Statute (F), in these words: 'so, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompence of a wrong done to him contrary to the said law.' (Per Holt, C. J., *Anon.*, 6 Mod. 26, 27.) This is but an application of

24; *Galveston, H. & S. A. Ry. Co. v. Kurtz*, — Tex. Civ. App. —, 147 S. W. 658.

Wisconsin. *Calhoun v. Great Northern R. Co.*, 162 Wis. 264 156 N. W. 198.

2. *Texas & P. R. Co. v. Rigs-*

*by*, 241 U. S. 33, 60 L. Ed. 874, 36 Sup. Ct. 482; *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476, 60 L. Ed. 1110, 36 Sup. Ct. 626; *St. Louis & S. F. R. Co. v. Conarty*, 238 U. S. 243, 59 L. Ed. 1290, 35 Sup. Ct. 785.



the maxim, *Ubi jus ibi remedium*. Sec. 3 Black. Com. 51, 123; *Couch v. Steel*, 3 El. & Bl. 402, 411; 23 L. J. Q. B. 121, 125. The inference of a private right of action in the present instance is rendered irresistible by the provision of section 8 of the Act of 1893 that an employee injured by any car, etc., in use contrary to the act shall not be deemed to have assumed the risk, and by the language above cited from the proviso in section 4 of the 1910 act. Plaintiff's injury was directly attributable to a defect in an appliance which by the 1910 amendment was required to be secure, and the Act must therefore be deemed to create a liability in his favor.<sup>73</sup>

**§ 775. Statute Imposes Absolute and Unqualified Duty to Maintain Appliances in Secure Condition.**

The Federal Safety Appliance Act imposes an absolute and unqualified duty to maintain the equipment and appliances, required by its provisions, in secure condition. That the defect was not known or could not have become known to the railroad company by the exercise of any care, is entirely immaterial in both personal injury actions and in suits for penalties. The question whether the defects causing the injury were due to the carrier's negligence, is not the criterion of liability. As to the equipment required by the act, the carrier is an absolute insurer and no amount of diligence on its part will exonerate it if any of its cars are not equipped as required. The duty to maintain the appliances in secure condition is absolute.<sup>4</sup> "In the case of *St. Louis,*

3. *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. Ed. 874, 36 Sup. Ct. 482.

4. *United States. Minneapolis & St. L. R. Co. v. Gotschall*, 244 U. S. 66, 61 L. Ed. 995, 37 Sup. Ct. 598, 14 N. C. C. A. 865; *Louisville & N. R. Co. v. Layton*, 243 U. S. 617, 61 L. Ed. 931, 37 Sup. Ct. 456; *St. Joseph & G. I. R. Co. v. Moore*, 243 U. S. 311, 61 L. Ed. 741, 37 Sup. Ct. 278; *At-*

*lantic City R. Co. v. Parker*, 242 U. S. 56, 61 L. Ed. 150, 37 Sup. Ct. 69; *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476, 60 L. Ed. 1110, 36 Sup. Ct. 626; *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. Ed. 874, 36 Sup. Ct. 482; *Great Northern R. Co. v. Otos*, 239 U. S. 349, 60 L. Ed. 322, 36 Sup. Ct. 124; *Delk v. St. Louis & S. F. R. Co.*, 220 U. S. 580, 55 L. Ed. 590, 31 Sup. Ct.

Iron Mountain & Southern Ry. Co. v. Taylor, 210 U. S. 281, often approved by this court, it was settled, once

617; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. Ed. 582, 31 Sup. Ct. 612 Pennsylvania R. Co. v. United States, 154 C. C. A. 526, 241 Fed. 824; United States v. Trinity & B. V. R. Co., 128 C. C. A. 120, 211 Fed. 448; Nichols v. Chesapeake & O. R. Co., 115 C. C. A. 601, 195 Fed. 913; Norfolk & W. R. Co., v. United States, 112 C. C. A. 46, 191 Fed. 302; Norfolk & W. R. Co. v. United States, 101 C. C. A. 249, 177 Fed. 623; Atchison, T. & S. F. R. Co. v. United States, 96 C. C. A. 664, 172 Fed. 1021; United States v. Baltimore & O. R. Co., 170 Fed. 456; United States v. Southern Pac. Co., 94 C. C. A. 629, 169 Fed. 407; Atlantic Coast Line R. Co. v. United States, 94 C. C. A. 35, 168 Fed. 175; United States v. Southern Pac. Co., 167 Fed. 699; United States v. Atchison, T. & S. F. Ry. Co., 167 Fed. 696; United States v. Erie R. Co., 166 Fed. 352; Chicago, M. & St. P. R. Co. v. United States, 91 C. C. A. 373, 165 Fed. 423; United States v. Denver & R. G. R. Co., 90 C. C. A. 329, 163 Fed. 519; United States v. Atchison, T. & S. F. R. Co., 90 C. C. A. 327, 163 Fed. 517; United States v. Lehigh Valley R. Co., 162 Fed. 410; United States v. Pennsylvania R. Co., 162 Fed. 408; United States v. Philadelphia & R. Ry. Co., 162 Fed. 403; United States v. Southern Pac. Co., 154 Fed. 897; Plummer v. Northern Pac. Ry. Co., 152 Fed. 206; United States v. Great Northern Ry. Co., 150 Fed. 229.

**Arkansas.** St. Louis & S. F. R.

Co. v. Conarty, 106 Ark. 421, 155 S. W. 93.

**Delaware.** Philadelphia & R. Co. v. Winkler, 4 Pennw. (Del.) 387, 56 Atl. 112.

**Florida.** Atlantic Coast Line R. Co. v. Whitney, 65 Fla. 72, 3 N. C. C. A. 812, 61 So. 179.

**Georgia.** Louisville & N. R. Co. v. Layton, 145 Ga. 886, 90 S. E. 53.

**Illinois.** Luken v. Lake Shore & M. S. R. Co., 140 Am. St. Rep. 220, 21 Ann. Cas. 82, 248 Ill. 377, 94 N. E. 175.

**Indiana.** Grand Trunk Western Ry. Co. v. Poole, 175 Ind. 567, 93 N. E. 26.

**Iowa.** Stearns v. Chicago, R. I. & P. R. Co., 166 Iowa, 566 148 N. W. 128.

**Kentucky.** Nashville, C. & St. L. Ry. Co. v. Henry, 158 Ky. 88, 164 S. W. 310.

**Louisiana.** Gordon v. New Orleans Great Northern R. Co., 135 La. 137, 64 So. 1014.

**Minnesota.** Davis v. Minneapolis & St. L. R. Co., 134 Minn. 369, 159 N. W. 802; Cramer v. Chicago, M. & St. P. R. Co., 134 Minn. 61, 158 N. W. 796; Hurley v. Illinois Cent. R. Co., 133 Minn. 101, 157 N. W. 1005; Coleman v. Illinois Cent. R. Co., 132 Minn. 22, 155 N. W. 763; Willett v. Illinois Cent. R. Co., 122 Minn. 513, 4 N. C. C. A. 479, 142 N. W. 883; Popplar v. Minneapolis, St. P. & S. S. M. R. Co., 121 Minn. 413, Ann. Cas. 1914D 383, 141 N. W. 798.

**Missouri.** Christy v. Wabash R. Co., 95 Mo. App. 232, 191 S. W. 241; Moore v. St. Joseph &

for all, that Congress, not satisfied with the common-law duty and its resulting liability, in the Safety Appliance Act of March 2, 1893, 27 Stat. 531, prescribed and defined certain definite standards to which interstate carriers must conform, and of the required automatic couplers this court said, Congress has 'enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not couple with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or to lessen their significance.' The exercise of care, even the greatest, in supplying and repairing these appliances will not excuse defects in them,—the duty and liability are absolute. St. Louis, Iron Mountain and Southern Ry.

G. I. R. Co., 268 Mo. 31, 186 S. W. 1035; Noel v. Quincy, O. & K. C. R. Co., — Mo. App. —, 182 S. W. 787.

**North Carolina.** Montgomery v. Carolina & N. W. R. Co., 163 N. C. 597, 80 S. E. 83.

**South Carolina.** Carson v. Southern Ry. 68 S. C. 55, 46 S. E. 525.

**Texas.** San Antonio & A. P. Ry. Co. v. Wagner, — Tex. Civ. App. —, 166 S. W. 24; Galveston, H. & S. A. Ry. Co. v. Kurtz, — Tex. Civ. App. —, 147 S. W. 658.

"The declared purpose of the Safety Appliance Act of 1893 (c. 196, 27 Stat. 531), and of the amendatory Acts of 1903 and 1910 is 'to promote the safety of employees . . . upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers . . . and for other purposes,' and at the time the plaintiff was injured these acts made it unlawful for any carrier engaged in interstate commerce

to use on its railroad any car not so equipped. Southern Railway Co. v. United States, 222 U. S. 20; Southern Railway Co. v. Railroad Commission of Indiana, 236 U. S. 439. By this legislation the qualified duty of the common law is expanded into an absolute duty with respect to car couplers and if the defendant railroad companies used cars which did not comply with the standard thus prescribed they violated the plain prohibition of the law, and there arose from that violation a liability to make compensation to any employee who was injured because of it. St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor, 210 U. S. 281, 295; Chicago, Burlington & Quincy Ry. Co. v. United States, 220 U. S. 559; Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33; Illinois Central R. R. Co. v. Williams, 242 U. S. 462." Louisville & N. R. Co. v. Layton, 243 U. S. 617, 61 L. Ed. 931, 37 Sup. Ct. 456.

Co. v. Taylor, *supra*; Great Northern Ry. Co. v. Otos, 239 U. S. 349, 351.”<sup>5</sup>

§ 776. **Substitutes for Appliances Required by Safety Appliance Act not Lawful.** The statute prescribes and defines certain definite standard appliances on cars which interstate carriers must maintain. Railroad companies are not, therefore, permitted to allow the statutory requirements to be satisfied by equivalents or by anything less than literal compliance with what the statute prescribes. A compliance with the statute is not shown if the carrier furnishes some other appliance which may be “just as good.”<sup>6</sup> In the Moore case, an employe brought an action against an interstate carrier for a violation of Section 4 of the Act which requires secure grab irons or hand holds in the ends and sides of each car for greater security to the men in coupling and uncoupling cars. The trial court instructed the jury that “any iron rod or iron devise securely fastened upon the end of defendant’s tender to which employes could conveniently catch hold while in the performance of their duties in coupling or uncoupling cars was a hand hold or grab iron within the meaning of the law” and that if the pin lifter or coupling lever extending across the end of an engine tender just above the coupler was so designed and constructed as to permit employes to readily grasp it, for their better security while coupling cars, the carrier was not guilty of a failure in providing proper hand holds or grab irons. The Supreme Court of Missouri<sup>7</sup> held that this instruction was more favorable to the carrier than it deserved and was in fact error in its favor, and the same conclusion was also reached by the United States Supreme Court.

5. St. Joseph & G. I. R. Co. v. Moore, 243 U. S. 311, 61 L. Ed. 741, 37 Sup. Ct. 278.

6. St. Joseph & G. I. R. Co. v. Moore, 243 U. S. 311, 61 L. Ed. 741, 37 Sup. Ct. 278; Lemee v. Texas & P. Ry. Co., 141 La. 769, 75 So. 676.

7. Moore v. St. Joseph & G. I. R. Co., 268 Mo. 31, 186 S. W. 1035, in which Blair, J., said: “The applicable Safety Appliance Act provides: ‘It shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with

**§ 777. Duty of Carrier in Personal Injury Suits as Broad as in Actions for Penalties.** While the act does not in express terms create a remedial action for death or injury due to a failure to comply with its provisions, yet the right of private action by an injured employe for any violation which would sustain a recovery for a penalty, has never been doubted. The obligation of a common carrier by railroad to comply with the statute is exactly the same in personal injury actions as

secure grab-irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.' The term 'car' includes 'tenders.' The act contains an absolute command. It is not satisfied by the use of reasonable care to equip cars as it directs. The equipment must be in place and in operative condition if the car is used in interstate commerce. (*C. B. & Q. Ry. v. United States*, 220 U. S. 574, et seq.) It does not authorize the placing upon cars and tenders of substitutes for grab-irons; nor does it provide that some other appliance, so constructed that it may be grasped, may serve instead of grab-irons and excuse their omission. The same act provided for automatic couplers which could be coupled and uncoupled 'without the necessity of men going between the ends of the cars' and separately provided that 'grab-irons or handholds' should be placed in the sides and ends of cars used in interstate commerce. It is clear Congress intended to and did require *both* the automatic coupler, which included its 'uncoupling lever' or pin-lifting rod, *and, in addition*, required grab-irons or handholds

to be placed in the ends and sides of cars. The instruction, therefore, was erroneously favorable to appellant in permitting the jury to exonerate it if it had failed to place grab-irons on its tender, but had offered a substitute in the form of a pin-lifting or uncoupling rod. That the act did not contemplate such a substitution is clear from the terms. It has been so held by one Federal court. (*United States v. Railway*, 184 Fed. 94; *United States v. Railway*, 184 Fed. 99.) Either automatic couplers, with their uncoupling levers, were in use and upon cars when the applicable Safety Appliance Act was passed or they were not. If they were not in use, it is impossible that Congress had them in mind in requiring grab-irons in the end on cars. If they were in use, then the act clearly contemplated grab-irons in addition to them in order to afford employes 'greater security' than was then afforded by whatever appliances were upon the cars. It is true there are decisions which construe the act otherwise, but the cases cited are in better accord with its language and the circumstances attending its passage."

it is in actions by the Government for penalties.<sup>8</sup> In the Rigsby case, cited, it was contended that while the penal provisions might apply to cars used in interstate commerce, yet a right of action by an employe injured because of a failure to comply with the act could not be upheld unless he was engaged in interstate commerce. In denying this contention of the railroad company, the court said: "It is argued that the authority of that case (Southern R. Co. v. United States, 222 U. S. 20, 56 L. Ed. 72, 32 Sup. Ct. 2) goes no further than to sustain the penal provisions of the act, and does not uphold a right of action by an employe injured through a violation of its provisions unless he was engaged in interstate commerce. That the scope of the Legislation is broad enough to include all employes thus injured, irrespective of the character of the commerce in which they are engaged, is plain. \* \* \* In Ill. Cent. R. R. v. Behrens, 233 U. S. 473, 477, the court said, *arguendo*, with reference to this topic: 'Considering the status of the railroad as a highway for both interstate and intrastate commerce, the interdependence of the two classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work, was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce.' Judicial expressions in previous cases were referred to, and the decision in Employers' Liability Cases, 207 U. S. 463, was distinguished because the act of June 11, 1906, there pronounced invalid, attempted to regulate the liability of every

8. Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 60 L. Ed. 874, 36 Sup. Ct. 482; Atlantic Coast Line R. Co. v. United States, 168 Fed.

175; United States v. Atchison, T. & S. F. Ry. Co., 163 Fed. 517.

carrier in interstate commerce for any injury to any employee, even through his employment had no relation whatever to interstate commerce. The doing of plaintiff's work, and his security while doing it, cannot be said to have been wholly unrelated to the safety of the main track as a highway of interstate commerce; for a failure to set the brakes so as temporarily to hold the 'bad order' cars in place on that track would have been obviously dangerous to through traffic; while an injury to the brakeman had a tendency to cause delay in clearing the main line for such traffic. Perhaps upon the mere ground of the relation of his work to the immediate safety of the main track plaintiff's right of action might be sustained. But we are unwilling to place the decision upon so narrow a ground, because we are convinced that there is no constitutional obstacle in the way of giving to the Act in its remedial aspect as broad an application as was accorded to its penal provisions in *Southern Railway v. United States*, supra. In addition to what has been quoted from the opinions in that case and the *Behrens Case*, the following considerations are pertinent. In the exercise of its plenary power to regulate commerce between the States, Congress has deemed it proper, for the protection of employees and travelers, to require certain safety appliances to be installed upon railroad cars used upon a highway of interstate commerce, irrespective of the use made of any particular car at any particular time. Congress having entered this field of regulation, it follows from the paramount character of its authority that state regulation of the subject-matter is excluded. *Southern Ry. v. R. R. Comm.*, Indiana, 236 U. S. 439. Without the express leave of Congress, it is not possible, while the Federal legislation stands, for the States to make or enforce inconsistent laws giving redress for injuries to workmen or travelers occasioned by the absence or insecurity of such safety devices, any more than laws prescribing the character of the appliances that shall be maintained, or imposing penalties for failure to maintain them; for the consequences that shall follow a breach of the law are vital and integral to its effect

as a regulation of conduct, liability to private suit is or may be as potent a deterrent as liability to public prosecution, and in this respect there is no distinction dependent upon whether the suitor was injured while employed or traveling in one kind of commerce rather than the other. Hence, while it may be conceded, for the purposes of the argument, that the mere question of compensation to persons injured in intrastate commerce is of no concern to Congress, it must be held that the liability of interstate carriers to pay such compensation because of their disregard of regulations established primarily for safeguarding commerce between the States, is a matter within the control of Congress; for unless persons injured in intrastate commerce are to be excluded from the benefit of a remedial action that is provided for persons similarly injured in interstate commerce a discrimination certainly not required by anything in the Constitution—remedial actions in behalf of intrastate employees and travelers must either be governed by the acts of Congress or else be left subject to regulation by the several states, with probable differences in the law material to its effect as regulatory of the conduct of the carrier. We are therefore brought to the conclusion that the right of private action by an employee injured while engaged in duties unconnected with interstate commerce, but injured through a defect in a safety appliance required by the act of Congress to be made secure, has so intimate a relation to the operation of the Act as a regulation of commerce between the States that it is within the constitutional grant of authority over that subject."

**§ 778. Remedial Features of the Statute Apply to Movements of Cars Solely for Repairs.** Under Section 4 of the 1910 amendment, a car which has been properly equipped as provided in the act, and which thereafter shall have become defective while being used on the railroad, may be removed from the place where the equipment was first discovered to be defective to the nearest available point for repairs without liability for the penalties imposed by the act, if such movement is



necessary to make repairs and such repairs cannot be made except at such repair point. But it is expressly provided that such movements for repair do not relieve the carrier from liability for death or injury of any employe by reason of any connection with such movement of a car defective or not equipped as required by the act. In a personal injury action for damages, it appeared that an employe was injured by reason of a defective automatic coupler while assisting in the movement of a car, marked for repairs, to the repair track. The railroad company contended that the amendment of 1910 required it to remove the car for repairs and that its effort to comply with the statute could not constitute a tort, and that as the plaintiff was the person intrusted with the details of the movement, he could not make the carrier responsible for the mode in which the duty was carried out.<sup>9</sup> Replying to these suggestions and denying their soundness, in view of the above provision of the act, the court said: "But we are of opinion that the argument cannot prevail. \* \* \* As the Safety Appliance Act governed, the case, it imposed an absolute liability upon the carrier. (Citing cases.) The supplementary act of April 14, 1910, chap. 160, sec. 4, 36 Stat. at L. 299, Comp. Stat. 1913, sec. 8621, relieves the carrier from the statutory penalties while the car is being hauled to the nearest available point where it can be repaired, but expressly provides that it shall not be construed to relieve from liability for injury to an employee in connection with the hauling of the car. The next section recites that under sec. 4 the movement of a car with defective equipment may be made within the limits there specified without incurring the penalties, 'but shall in all other respects be unlawful.' Whether or not the absolute liability created by the earlier act extended to the present case, and we are far from implying that it did

9. *Great Northern R. Co. v. Otos*, 239 U. S. 349, 60 L. Ed. 322, 36 Sup. Ct. 124, aff'g 129 Minn. 523, 151 N. W. 1102.

not, the act of 1910 imports, with unmistakable iteration, that the liability exists."

**§ 779. Doctrine of Siegel v. New York Cent. & H. River R. Co., and Like Cases, Overruled.** The decision of the national Supreme Court in the *Otos* case, *supra*, holding that the carrier remains liable for personal injuries due to defective cars even when removing them for repairs, overrules the doctrine applied in *Siegel v. New York Cent. & H. River R. Co.*,<sup>10</sup> and other like cases. In the *Siegel* case, a brakeman was injured because of a defective coupling apparatus while the car was being shifted for the purpose of sending it to a repair shop. The court held that the carrier was not liable for the reason that the act did not apply to a movement of a defective car for purposes of repair. Such cases, under the amendment of 1910, do not properly declare the law as to liability for personal injuries though the amendment exonerates the carrier for penalties in the necessary movement of a defective car for repair.

**§ 780. Duties Imposed by Statute in One Relation not Actionable in Another.** The duties imposed by the Safety Appliance Act are for the protection of persons in particular situations and relations, and breach of the statute in some other and altogether different situation or relation is not actionable if injury results. Thus, an employe crushed and killed in an impact between a car without a drawbar and coupler, and a switch engine on which he was riding, did not create a cause of action in favor of his administrator as he was not at the time handling the car in any way or attempting to do any work in connection with it.<sup>11</sup>

**§ 781. Proof of Knowledge of Defect Not an Element of Violation of Statute.** In neither a personal injury action nor a suit for penalty, is the plaintiff

10. 178 Fed. 873.

*v. Conarty*, 238 U. S. 243, 59 L.

11. *St. Louis & S. F. R. Co.*

*Ed.* 1290, 35 Sup. Ct. 785.

required to show that the carrier had knowledge, either actual or constructive, of the defects or violations of the statute, because the carrier must ascertain at its peril whether it has equipped its cars with the appliances required by the act, and want of knowledge or ignorance of the condition of the cars, does not constitute a defense.<sup>12</sup>

**§ 782. Use of Care and Diligence in Discovering and Repairing Defects, No Defense.** That the carrier used care and diligence, either ordinary or extraordinary, to discover and repair the defective appliances, is no defense under the Safety Appliance Act either in an action for a penalty or in a personal injury suit.<sup>13</sup> This conclusion necessarily follows from the ruling of the national Supreme Court in the first and leading case concerning the duty of the carrier under the act<sup>14</sup> that the requirements of the act are absolutely mandatory. The exercise, therefore, of reasonable care is no excuse. In *Wabash Co. v. United States*,<sup>15</sup> the following instruction was held to be a proper declaration of law: "The testimony of the defendant's witnesses was admitted here as to the inspection of those cars, for the purpose

12. *Chesapeake & O. R. Co. v. United States*, 141 C. C. A. 439, 226 Fed. 683; *United States v. Trinity & B. V. R. Co.*, 128 C. C. A. 120, 211 Fed. 448; *Chicago, B. & Q. R. Co. v. United States*, 95 C. C. A. 642, 170 Fed. 556; *United States v. Southern Pac. Co.*, 167 Fed. 699; *United States v. Southern Pac. Co.*, 154 Fed. 897; *United States v. Chicago, M. & St. P. Ry. Co.*, 149 Fed. 486. *Contra*: *United States v. Illinois Cent. R. Co.*, 156 Fed. 182; *United States v. Atchison, T. & S. F. Ry. Co.*, 150 Fed. 442.

13. *Pennsylvania Co. v. United States*, 154 C. C. A. 526, 241 Fed. 824; *Wabash R. Co. v. United States*, 97 C. C. A. 284, 172 Fed.

864; *United States v. Southern Pac. Co.*, 94 C. C. A. 629, 169 Fed. 407; *United States v. Denver & R. G. R. Co.*, 90 C. C. A. 329, 163 Fed. 519; *United States v. Atchison, T. & S. F. R. Co.*, 90 C. C. A. 327, 163 Fed. 517. *Contra*: *United States v. Illinois Cent. R. Co.*, 95 C. C. A. 628, 170 Fed. 542; *St. Louis & S. F. R. Co. v. Delk*, 86 C. C. A. 95, 158 Fed. 931, 14 Ann. Cas. 233, overruled in 220 U. S. 580, 55 L. Ed. 590, 31 Sup. Ct. 617; *United States v. Illinois Cent. R. Co.*, 156 Fed. 182.

14. *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. Ed. 1061, 28 Sup. Ct. 616.

15. 97 C. C. A. 284, 172 Fed. 864.

of tending to show as far as in your judgment it does tend to show, that the defendant's cars were in good order. The mere fact that the defendant had used diligence or care to keep those cars in a reasonably safe condition is not a question before you. That is no defense to this suit. This statute is commanding, and requires the defendant at its peril to keep these couplers in such condition so that the men whose business it is to couple them will not be required to go between the cars to do it; and if you believe from all the evidence in this case that they were so out of order that they could not be coupled without men going between the cars to do the coupling, then the defendant would be guilty under the declaration, and you will so find."

**§ 783. Proof of Negligence under Liability Act not Required if Injury was Due to Violation of Safety Appliance Act.** While the Federal Employers' Liability Act predicates a recovery in all cases upon defects in whole or in part "due to its negligence," no evidence of negligence is required where the cause of the injury is alleged to be a violation of the Safety Appliance Act. The Federal Employers' Liability Act clearly recognizes that rights of action may arise out of a violation of the Safety Appliance Act and a disregard of the command of the statute is a wrongful act and the right to recover damages from the party in default is implied. The two statutes are *in pari materia* and the clause in the Federal Employers' Liability Act "due to its negligence" must be construed to mean that Congress intended to treat a violation of the Safety Appliance Act as negligence per se.<sup>16</sup>

**§ 784. Same Subject—Taylor v. St. Louis, I. M. & S. Ry. Co.** Unquestionably the decision of the

16. San Antonio & A. P. R. Co. v. Wagner, 241 U. S. 476, 60 L. Ed. 1110, 36 Sup. Ct 626; Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 60 L. Ed. 874, 36 Supt.

Ct. 482; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635, 8 N. C. C. A. 834, L. R. A. 1915C 1, Ann. Cas. 1915B 475.

United States Supreme Court holding that the requirements of the statute were mandatory and that neither negligence nor ignorance was a defense, was the most important ruling of that court in construing the Safety Appliance Act. The decision of the court was first made in a personal injury action<sup>17</sup> which, in effect, overruled many former decisions to the contrary. The Taylor case originated in the courts of Arkansas. One Neil, as administrator, brought an action against the railroad company to recover damages for the death of Taylor, one of its employes, whose death, it was claimed, was caused by the company's failure to provide certain appliances required by the act of Congress. In the lower court a verdict was returned for the railroad company by direction of the court, but on appeal by the plaintiff to the Supreme Court of Arkansas, that court held that the act of Congress supplanted the general rule between master and servant which only required the master to exercise reasonable care, and that the statute required an absolute compliance with its provision. The case was then remanded for a new trial and on the second trial the railway company asked the following instruction: "The court tells you that if you find from the evidence in this case that defendant equipped all its cars with uniform standard-height drawbars when such cars are first built and turned out of the shops, then the defendant is only bound to use ordinary care to maintain such drawbars at the uniform standard-height spoken of in the testimony." This instruction was refused by the trial court and its action was affirmed by the Supreme Court of Arkansas on the second appeal.<sup>18</sup> From this decision the railway company prosecuted a writ of error to the Supreme Court of the United States and the refusal to give the instruction mentioned was assigned as error and the court held that it was properly refused. The same

17. St. Louis, I. M. & S. R.  
Co. v. Taylor, 210 U. S. 281, 52  
L. Ed. 1061, 28 Sup. Ct. 616.

18. St. Louis, I. M. & S. R.  
Co. v. Neal, 83 Ark. 591, 98 S.  
W. 958.

ruling as to the absolute requirements of the statute was later applied by the same court in penal actions.<sup>19</sup>

**§ 785. When Employee's Negligence is Sole Cause of Injury, No Recovery Permitted.** If the violation of the Safety Appliance Act contributes to cause an injury to an employee engaged at the time in interstate commerce, then the carrier is liable no matter how careless or negligent the employee might have been.<sup>20</sup> But if the negligent conduct of the employee was the sole cause of the injury and the violation of the statute by the carrier was not, in whole or in part, a contributing cause, then the carrier is not liable.<sup>21</sup>

19. *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 559, 55 L. Ed. 582, 31 Sup. Ct. 612.

20. *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. Ed. 1125, 36 Sup. Ct. 683, 12 N. C. C. A. 1083; affirming 133 C. C. A. 370, 217 Fed. 218, in which Mr. Justice Pitney said: "It is too plain for argument that under this legislation, the violation of the Safety Appliance Act need not be the sole efficient cause, in order that an action may lie. The Circuit Court of Appeals (133 C. C. A. 370, 217 Fed. 524) held that the element of proximate cause is eliminated where concurring acts of the employer and the employee contribute to the injury or death of the employee. We agree with this, except that we find it unnecessary to say the effect of the statute is wholly to eliminate the question of proximate cause. But where, as in this case, plaintiff's contributory negligence and defendant's violation of a provision of the Safety Appliance Act are concurring proximate causes, it is plain that the Employers' Lia-

bility Act requires the former to be disregarded."

21. *Smith v. Atlantic Coast Line R. Co.*, 127 C. C. A. 311, 210 Fed. 761. The court said: "It being shown that the coupler was defective, that is, did not conform to the statutory standard of efficiency and that, in endeavoring to make a coupling, the employee is injured, the sole question, left open, is whether such defective condition contributed to the injury; that is, whether the negligent conduct of the employee was the sole cause of the injury, or the violation of duty by the carrier, was 'in whole or in part' a contributive cause thereof. It follows that, before the court may, in such cases give a peremptory instruction for the defendant, or take the case from the jury, the evidence, taken in the light most favorable to the plaintiff, must exclude the conclusion that the violation of the Safety Appliance Act contributed to the injury. If the defective condition of the coupler, and the act of the employee, although negligent, co-operated to bring about the result the latter

**§ 786. Duties Imposed by Statute Cannot Be Evaded by Contract.** The absolute and imperative duty of maintaining appliances in operative condition cannot be evaded by contract with another carrier.<sup>22</sup> Thus, in the case cited, the inspection of the cars of the defendant was made by the employes of another railroad company. This was urged as a defense, but the court said: "The fact, if it be a fact, that in this case the inspection of the cars was made by the servants of the Central Railroad of New Jersey, can not relieve the defendant from the liability imposed by the Act. It can not by contract dispense with any care required of it by law, and the most that could be said of such a situation would be that it had voluntarily made the inspectors of the other company its own."

**§ 787. Inconvenience and Impracticability of Statutory Requirements will not Excuse Violation.** That the execution of the requirements of the statute will frequently be very inconvenient and even sometimes impracticable, has been recognized by the courts; but neither inconvenience nor the impracticability of a literal compliance with the statute, will be accepted as an excuse for a failure to comply with the act.<sup>23</sup>

is entitled to recover." See also *Grand Trunk Western R. Co. v. Lindsay*, 120 C. C. A. 166, 201 Fed. 836, affirmed in 233 U. S. 42, 58 L. Ed. 838, 34 Sup. Ct. 581.

22. *Philadelphia & R. R. Co. v. United States*, 111 C. C. A. 661, 191 Fed. 1.

23. *United States v. Pere Marquette R. Co.*, 211 Fed. 220; *United States v. Grand Trunk Ry. Co. of Canada*, 203 Fed. 775; *Siegel v. New York Cent. & H. River R. Co.*, 178 Fed. 873; *United States v. Southern Pac. Co.*, 94 C. C. A. 629, 169 Fed. 407; *Chicago, Junction R. Co. v. King* 94 C. C. A. 652, 129 Fed. 372.

"Conformity" to the requirements of the law, as so inter-

preted, it must be admitted, will even be inconvenient and sometimes impracticable; but Congress had before it for consideration the important question of promoting the safety of employes and travelers upon railroads and in the accomplishment of its purpose it may well be that the legislative mind considered the inconvenience and impracticability of a literal compliance at times with the law, and the consequent infliction of the light penalties imposed for its violation to be of little moment compared with the greater importance of protecting life, limb and property."—Adams, J., in *United States v. Southern P. Co.*, *supra*.

**§ 788. Appliances Required by Statute must be Operative.** It is not sufficient under the statute for the carrier to furnish or equip its cars with the appliances prescribed in the statute. The appliances must, in addition, be capable of operation and kept in such a condition that they may at all times be operative.<sup>24</sup> Thus, in the case cited, a carrier placed two levers, one on each side, to operate a coupling device when one lever might have been furnished. It was held to be the duty of the carrier to keep both in an operative condition. Said the court: "On the other hand, there is no restriction upon the placing of two such levers, one on each side, on the end of any or all its cars, if the companies desire or deem it conducive of more effective operation of the coupling automatically by impact without the necessity of men going between the ends of the cars. But while this is true, these levers, whether one or more, become parts of the coupling device itself, and we think a fair construction of the statute requires us to hold that the device itself must be in such repair as to be capable of operation, and if the levers furnished to operate it, whether one or two at the end of the car, should, as such parts of it, be kept in condition to operate it; that, if there be two, one on each side of the end of a car, and one be maintained in a condition capable of operation and the other not, the latter is calculated only to deceive the employee and under some conditions perhaps create a necessity, in other conditions at least a temptation, to be negligent and step between the cars to uncouple them by hand. The defective lever has no business there and should be either made operative or taken away, as it renders, in the true sense of the statute, the coupling device of which it is a part, defective."

**§ 789. Failure of Employee to Operate Appliance Capable of Being Operated, no Offense.** If the appliances required by statute are actually operative, that

24. Chicago, M. & P. S. R. Co., v. United States, 101 C. C. A. v. United States, 116 C. C. A. 444, 249, 177 Fed. 623.  
196 Fed. 882 Norfolk & W. R. Co.



is, capable of being operated, no penalty follows if, in fact, an employe fails to efficiently operate them. The equipment demanded by the statute must be operative, but improper manipulation of the appliance in that condition by an employe does not penalize the carrier.<sup>25</sup>

**§ 790. Deliberate Act of Employe in Causing Appliance to become Defective, no Defense.** The statute lays upon the carrier the duty of maintaining the appliance in a certain prescribed condition. If an employe of a carrier deliberately puts the device in another condition, which the law penalizes, the carrier is liable notwithstanding the unauthorized and unlawful act of the employe. Thus, where an employe removed the knuckle from a coupler for the purpose of changing it to another car so that the car was in such a condition that it was necessary for a man to pass between the end of it and an adjacent car in order to couple or uncouple it, the carrier was held guilty of a violation of the statute.<sup>26</sup>

**§ 791. Duties Placed upon Carrier by Statute Cannot be Evaded by Assignment.** The duties imposed upon common carriers by railroad under the Safety Appliance Act cannot be evaded by a contract with another railroad company requiring it to inspect the appliances upon cars. The direct statutory duty cannot be evaded by assignment or otherwise.<sup>27</sup>

**§ 792. Railroad Liable for Condition of Foreign Cars.** That the trains or cars hauled or used with defective appliances belong to another company, is wholly immaterial, for the statute makes no difference between cars that are owned by the carrier and cars belonging to another company that are hauled over its rails.<sup>28</sup>

25. United States v. Illinois Cent. R. Co., 156 Fed. 182.

26. United States v. Southern Pac. Co., 167 Fed. 699.

27. Philadelphia & R. R. Co.

v. United States, 111 C. C. A. 661, 191 Fed. 1; Chicago Junction R. Co. v. King, 94 C. C. A. 652, 169 Fed. 372.

28. Johnson v. Great Northern

**§ 793. Carriers may Refuse Defective Cars From Connecting Lines.** Carriers may lawfully refuse to accept cars not equipped with the appliances required by the Safety Appliance Act from other lines. The statute specifically so provides as to cars not equipped with air brakes as required in Section 1 of the original act, but the same rule must necessarily apply to all cars not equipped as required by the statute for a carrier cannot be compelled to receive cars, the acceptance and the slightest use of which would render it subject to a penalty. It must know, at its peril, that each car it receives from another line is equipped with the appliances demanded by the law and that such appliances are in good order.<sup>29</sup>

**§ 794. Defective Equipment Must be Proximate Cause of Injury.** In all actions for damages due to violation of Safety Appliance Act, proof of a defective appliance and an injury, is not sufficient to permit a recovery. The plaintiff must go further and show that defect was the proximate cause of the injury.<sup>30</sup>

R. Co., 102 C. C. A. 89, 178 Fed. 643; *United States v. Chicago Great Western Ry. Co.*, 162 Fed. 775; *United States v. Southern Ry. Co.*, 135 Fed. 122; *Grand Trunk Western R. Co. v. Poole*, 175 Ind. 567, 93 N. E. 26.

"It appears from the evidence that some of the cars alleged to have been hauled or used by the defendant in violation of the law were not its own cars, but were the cars of some other company. This fact was wholly immaterial. If such cars were in a defective condition, as contended on behalf of the plaintiffs, no matter to whom they belong, the defendant would incur the same penalty in hauling such cars when in such defective condition that it would if they were its own cars." —Reed, J., in *United States v.*

*Chicago G. W. Ry. Co.*, *supra*.

29. *United States v. Southern Pac. Co.* 167 Fed. 699.

30. *Great Northern R. Co. v. Otos*, 239 U. S. 349, 60 L. Ed. 322, 36 Sup. Ct. 124; *St. Louis, I. M. & S. R. Co. v. McWhirter*, 229 U. S. 265, 57 L. Ed. 1179, 33 Sup. Ct. 858; *Schweig v. Chicago, M. & St. P. Ry. Co.*, 205 Fed. 96 7 N. C. C. A. 135; *Erie R. Co. v. Russell*, 106 C. C. A. 160, 138 Fed. 722; *Voelker v. Chicago, M. & St. P. Ry. Co.*, 116 Fed. 687; *Devine v. Chicago & C. R. R. Co.*, 259 Ill. 449, 102 N. E. 803; *Dodge v. Chicago Great Western R. Co.*, 164 Ia. 627, 146 N. W. 14; *Osborne's Adm'r v. Cincinnati, N. O. & T. P. R. Co.*, Ann. Cas. 1915D 449, 158 Ky. 176 164 S. W. 818.

31. *Erie R. Co. v. Russell*, 106 C. C. A. 160, 183 Fed. 722; *Done-*

§ 795. **Question of Proximate Cause Ordinarily for the Jury.** The question whether a defect or a violation of the Safety Appliance Act is a proximate cause of an injury, is ordinarily a question for the jury;<sup>31</sup> but, when the facts are clearly shown and but one inference is possible to be drawn therefrom, that is, if the facts are such that all reasonable men must draw the same conclusion from them, the question of proximate cause of an injury is one of law.<sup>32</sup>

gan v. Baltimore & N. Y. R. Co., 91 C. C. A. 555, 165 Fed. 869; Grand Trunk Western R. Co. v. Poole, 175 Ind. 567, 93 N. E. 26; La Mere v. Railway Transfer Co. of Minneapolis, 125 Minn. 159, 145 N. W. 1068.

32. Choctaw, O. & G. R. Co. v. Holloway, 191 U. S. 334, 48 L. Ed. 207, 24 Sup. Ct. 102; Milwau-

kee & St. P. Ry. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256; Zimmerman v. Funchion, 89 C. C. A. 53, 161 Fed. 859; Southern Pac. Co. v. Yeargin, 48 C. C. A. 497, 109 Fed. 436; Missouri, K. & T. R. Co. v. Byrne, 40 C. C. A. 402, 100 Fed. 359; Devine v. Chicago & C. River R. Co., 259 Ill. 449, 102 N. E. 803.

## CHAPTER XLIII

### STATUTORY REQUIREMENTS AS TO AIR BRAKES:

- Sec. 796. Former and Present Requirements as to Power or Air Brakes on Trains.
- Sec. 797. Air Brake Provision not Applicable to Switching Movements.
- Sec. 798. What Constitutes a "Train" Under Air Brake Provision.
- Sec. 799. Inter-yard Movements as Distinguished from Intra-yard Movements Within Air Brake Provision—Transfer Trains.
- Sec. 800. Air Brakes Required on Interurban Electric Trains and Motors.
- Sec. 801. Injuries in Collisions Due to Failure of Train Brakes to Work.
- Sec. 802. Use of Hand Brakes in Train Movements Prohibited and Operation of Air Brakes Mandatory.
- Sec. 803. Absolute Duty to Maintain Appliances in Repair Applies to Air Brakes.

**§ 796. Former and Present Requirements as to Power or Air Brakes on Trains.** Section 1 of the original act prohibited any common carrier engaged in interstate commerce by railroad from using on its line any locomotive engine in moving interstate traffic not equipped with a power-driving wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after January 1, 1898 without a sufficient number of cars in it equipped with train brakes so that the engineer on the locomotive could control the speed without requiring brakemen to use the hand brake for that purpose.<sup>1</sup> Under the amendment of 1903,<sup>2</sup> the number of cars required to be equipped with air brakes was definitely fixed. That statute prescribed that not less than fifty per cent of the cars in a train should have their air brakes used and operated by the engineer, and further required all power brake cars in such train, which were associated

1. 27 Stat. at L. 531, Appendix 223 Fed. 748.  
G. *infra*; Virginian R. Co. v. 2. 32 Stat. at L. 943, Appendix  
United States, 139 C. C. A. 278, G. *infra*.

together with said fifty per cent, to have their brakes so used and operated.<sup>3</sup> The Interstate Commerce Commission by the same amendment was given the authority to increase the minimum percentage of cars in a train required to be operated with train brakes, and a failure to comply with any such requirements of the Interstate Commerce Commission subjects the carrier to a penalty. Under an order dated November 15, 1905, the minimum percentage of train brake cars was increased from fifty per cent as fixed by statute, to seventy-five per cent, by the Interstate Commerce Commission. Again on June 6, 1910, the minimum percentage was increased to eighty-five per cent by the following order of the Interstate Commerce Commission which is now in effect. "It is ordered that on and after September 1, 1910 on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than eighty-five per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-brake cars in every such train which are associated together with the eighty-five per cent shall have their brakes so used and operated."

**§ 797. Air Brake Provision not Applicable to Switching Movements.** The provisions of the first section of the original act as amended in 1903, requiring the use of the train-brake system, does not embrace switching movements, that is, the various movements in railroad yards where cars are assembled and coupled into outgoing trains and where incoming trains which have completed their trips, are broken up. These are not train movements within the meaning of the air brake provision.<sup>4</sup>

3. *Lyon v. Charleston & W. C. Ry.*, — S. C. —, 56 S. E. 18.

4. *United States v. Chicago, B. & Q. R. Co.*, 237 U. S. 410, 59 L. Ed. 1023, 35 Sup.

Ct. 634; *United States v. Erie R. Co.*, 237 U. S. 402, 59 L. Ed. 1019, 35 Sup. Ct. 621; *United States v. Louisville & Jeffersonville Bridge Co.*, 236 Fed. 1001.

**798. What Constitutes a "Train" Under Air Brake Provision.** Prior to a controlling decision of the Supreme Court of the United States,<sup>5</sup> the lower and intermediate federal courts had considerable difficulty in agreeing as to what constituted a train within the purview of the air brake provision of the Safety Appliance Act. Railroad companies had sometimes contended that a train consisted of an engine, cars and caboose with trainmen as distinguished from switchmen in control; but this theory was soon rejected.<sup>6</sup> A train consists of an engine and cars which have been assembled and coupled together for a run or trip along the road. The presence of a caboose is not material, nor is the question as to whether the cars were handled by switching crews.<sup>7</sup> "It will be perceived that the air-brake provision deals with running a train, while the other requirements relate to hauling or using a car. In one a train is the unit and in the other a car. As the context shows, a train in the sense intended consists of an engine and cars which have been assembled and coupled together for a run or a trip along the road. When a train is thus made up and is proceeding on its journey it is within the operation of the air-brake provision. But, it is otherwise with the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains and whereby incoming trains which have completed their run are broken up. These are not train movements but mere switching

**Iowa.** *Stearns v. Chicago, R. I. & P. R. Co.*, 166 Iowa 566, 148 N. W. 128.

**Minnesota.** *La Mere v. Railway Transfer Co.*, 125 Minn. 159, Ann. Cas. 1915C 607, 145 N. W. 1068.

**New Jersey.** *Farrell v. Pennsylvania R. Co.*, 87 N. J. L. 78, 93 Atl. 682.

**North Carolina.** *Worley v. Southern R. Co.*, 169 N. C. 105, 85 S. E. 397.

**Pennsylvania.** *Whalley v. Phila-*

*delphia & R. R. Co.*, 248 Pa. 298, 93 Atl. 1016.

5. *United States v. Chicago, B & Q. R. Co.*, 237 U. S. 410, 59 L. Ed. 1023, 35 Sup. Ct. 634; *United States v. Erie R. Co.*, 237 U. S. 402, 59 L. Ed. 1019, 35 Sup. Ct. 621.

6. *Atchison, T. & S. F. R. Co. v. United States*, 117 C. C. A. 341, 194 Fed. 637.

7. *United States v. Grand Trunk Ry. Co. of Canada*, 203 Fed. 775.

operations, and so are not within the air-brake provision. The other provisions calling for automatic couplers and grabirons are of broader application and embrace switching operations as well as train movements, for both involve a hauling or using of cars."<sup>8</sup>

§ 799. **Inter-yard Movements as Distinguished from Intra-yard Movements Within Air Brake Provision—Transfer Trains.** The foregoing principle was applied and the air brake provision was held applicable, to a string of cars hauled by an engine and manned by a switching crew while being moved from one terminal yard of a railroad company to another freight yard which were two miles apart, and which were connected by a main-line track and over a single-track bridge.<sup>9</sup> The movement of a string of cars, known in railway parlance as a "transfer," from one yard to another, two miles apart, over a main line, constituted a train within the meaning of the act and especially the amendment of 1903.<sup>10</sup> Where a transfer company hauled a "drag" of fifteen cars from its yard to the yard of another railroad company, and, in doing so, moved the cars over the main line of still another company for a distance of about four blocks, the entire movement being about half a mile, it was held that the cars should have been equipped with air brakes.<sup>11</sup> Employees of a rail-

8. *United States v. Erie R. Co.*, *supra*.

9. *United States v. Chicago, B. & Q. R. Co.*, 237 U. S. 410, 59 L. Ed. 1023, 35 Sup. Ct. 634.

10. *United States v. Erie R. Co.*, 237 U. S. 402, 59 L. Ed. 1019, 35 Sup. Ct. 621.

11. *La Mere v. Railway Transfer Co. of Minneapolis*, 125 Minn. 159, Ann. Cas. 1915C 607, 145 N. W. 1068, in which Dibell, C., said: "We are of the opinion that it should be held that the so-called 'drag' was a train within the meaning of the Safety Appliance Act. The switching had

been finished when the cars were on track 7 and coupled. They were then starting on their way. It was not in a proper sense a switching operation at all. It is not important that no caboose was attached. It is not important that when the train got to the Milwaukee yards the cars might be rearranged and go to different destinations as parts of different trains. It is not important that the engine was in a backward instead of a forward movement. The cars were on an interstate journey when they left track 7 and they made up a train. The

road company transporting a number of cars from a yard to a freight house about a mile away and crossing over a number of railway street crossings in the movement, were engaged in moving a train within the meaning of the Safety Appliance Act.<sup>12</sup>

**§ 800. Air Brakes Required on Interurban Electric Trains and Motors.** All interurban electric railroads engaged in interstate commerce are included within the train-brake provision of the Safety Appliance Act as amended by Section 1 of 1903 amendment which includes "all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce." The original act no doubt confined the air brake provision to steam-propelled locomotives and trains, but there can be no valid objection to the inclusion of trains or cars propelled by electricity if the railroad is engaged in interstate commerce. Generally interurban electric railroads are common carriers for persons and property the same as steam railroads and a difference in the propelling power does not exclude them from the broad provision of the amendatory act.<sup>13</sup>

trainmen were subject to the dangers against which the Safety Appliance Act sought to guard them by requiring the air to be connected. The cars and engine come within the ordinary definition of a train."

12. *Pennsylvania Co. v. United States*, 154 C. C. A. 526, 241 Fed. 824; *Stearns v. Chicago, R. I. & P. R. Co.*, 166 Ia. 566, 148 N. W. 128. *Contra*: *United States v. Erie R. Co.*, 129 C. C. A. 307, 212 Fed. 853; *Chicago, B. & Q. R. Co. v. United States*, 127 C. C. A. 438, 211 Fed. 12; *United States v. New York Cent. & H. R. R. Co.*, 205 Fed. 428; *Erie R. Co. v. United States*, 116 C. C. A. 649, 197 Fed. 287; *Rosney v. Erie R. Co.*, 68 C. C. A. 155, 135 Fed. 311.

13. *Spokane & I. E. R. Co. v. Campbell*, 133 C. C. A. 370, 217 Fed. 518, affirmed in 241 U. S. 497, 60 L. Ed. 1125, 36 Sup. Ct. 683, in which the court said: "The electric railroad has since come into very general use, with its driving engines called motors, and its employes in charge of the engines are called motormen or enginemen. These railroads, notwithstanding, are common carriers of property and persons, the same as steam railroads, and have employes and come into relation with the public in the same way, the only essential difference being that electricity has taken the place of steam as a propelling agency or force, with differently contrived engines, suited to the harnessing of the



§ 801. **Injuries in Collisions Due to Failure of Train Brakes to Work.** The statute and the order of the Interstate Commerce Commission thereunder made on June 6, 1910, and effective on September 1, 1910 requires not less than 85% of the cars in all trains governed by the act to have the brakes used and operated by the engineer of the locomotive drawing the train, and the order further requires all power brake cars in every such train which are associated together with the 85%, shall have their brakes so used and operated. A failure of the train brakes to act upon application which contributes directly to cause a collision, entitles an engineer or motorman injured thereby and employed at the time in interstate commerce to recover against the carrier notwithstanding his own negligence while in control of the train.<sup>14</sup> In the Campbell case, cited, a motorman on an interurban electric railroad was injured in a collision with another train. Just before the collision he saw the approaching car and applied the air brakes on his own train, but owing to some defect in the brakes, they refused to act, and a collision followed. The plaintiff's evidence disclosed the collision could have been avoided had the brakes been working properly, notwithstanding the contributory negli-

propelling agency to the use desired, so that the broad purpose of the Legislature applies as completely to the one kind of railroad as to the other. In a narrower sense, a locomotive engine is spoken of as an engine propelled by steam; but when the statute, as the amendment does, extends the provisions of the act to apply to all trains, locomotives, tenders, cars, and similar vehicles, it broadens the significance so as, without question, to include motors electrically propelled, used upon railroads engaged in interstate commerce.

So, also, the original act, with its amendment, includes the operators of such engines, whether called engineers or motormen. We think the statute is broad enough to require that electrically propelled engines and trains engaged in interstate commerce, as well as steam-propelled engines and trains, shall be equipped with air brakes for their efficient operation and control."

14. *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. Ed. 1125, 36 Sup. Ct. 683, 12 N. C. C. A. 1083, aff'g 133 C. C. A. 370, 217 Fed. 518.

gence of the motorman in failing to keep a lookout. The jury found that the motorman was also guilty of negligence contributing to the injury, but as the defective train brakes directly concurred in causing the collision and subsequent injury, a recovery under the Federal Employers' Liability Act and the Safety Appliance Act was sustained, it appearing that the motorman was engaged in interstate commerce.

**§ 802. Use of Hand Brakes in Train Movements Prohibited and Operation of Air Brakes Mandatory.**

All trains on railroads engaged in interstate commerce must not only be equipped with the required percentage of air brakes, but the air brake system must be used and operated to the entire exclusion of the hand brakes in train movements.<sup>15</sup> Congress, in requiring the use and operation of the train brake system, by necessary implication, declared that the use of hand brakes was unlawful. In *Virginia Ry. Co. v. United States*<sup>16</sup> a prosecution for a penalty for violating the air brake provision, it was stipulated that the engine and train in question were fully equipped with appliances for operating the train brake system, and that all the cars in the train were so equipped so that the engineer could control the speed of the train without requiring the brakemen to use the common hand brakes. All the appliances required by the statute were fully provided, were of proper construction and in working order. The train being of unusual length, it was deemed expedient, to avoid accidents on certain heavy grades, that the hand brakes be used as the trains could not be operated safely at a slow rate of speed because the air could not be applied with the needed effect without stopping the train, or if released before the train stopped, would cause such a violent jerking as to break knuckles, pins and couplers and pull out drawbars.

15. *United States v. Grand Rapids & I. Ry.* 244 Fed. 609; 157 C. C. A. 32, 244 Fed. 406.

16. *Great Northern R. Co. v. United States* 139 C. C. A. 278, 223 Fed. 748.

The evidence disclosed that trains of shorter length could have been safely stopped without the use of hand brakes. In declaring, under these facts, that the carrier violated the train brake provision of the act in permitting the brakemen to use the hand brakes, Judge Knapp, for the court, said: "The proposition is also stated in this form: 'The object of Congress was evidently that the automatic power brakes should be used to control the speed of the train at all times when good railroad practice would require the use of such brakes, and to permit the use of hand brakes under such circumstances as, in the judgment of the people in charge of the operation of the trains, would promote the safety of the operation.' It is obvious that such a construction would practically nullify the train brake requirement, and take all effective meaning from the provision which makes it unlawful to run 'any train' unless the locomotive and cars are so equipped that the engineer can control its speed 'without requiring the brakeman to use the common hand brake for that purpose.' The contention must be rejected as clearly unsound. It is impossible to believe that the Congress compelled the equipment of locomotives and cars with the appliances specified in the act, for the declared purpose of doing away with the dangerous operation of hand brakes, and then left it to the carriers themselves to decide when and under what circumstances those appliances should be used. On the contrary, we deem it beyond doubt that the duty imposed by the provision here considered is mandatory and absolute. There is no express or implied qualification, which in any way relates to the question at issue, and it is not for the courts to introduce an exception which the Congress did not see fit to make. The peculiar and unusual conditions which existed on this section of defendant's road cannot be permitted to excuse an avoidance of the positive requirements of the act. Moreover, those conditions disclose no emergency or extraordinary difficulty. They simply show that the defendant, for the sake of convenience or economy, deliberately ordered the use of hand brakes in the

daily and customary operation of its trains. The justification set up is that trains of 100 cars cannot be moved on this stretch of track, at the slow speed of 10 miles an hour or less, and kept under safe control with the use only of the prescribed power brake. But those operating conditions, which occasioned the need of hand brakes, are evidently of defendant's own creation. All it has to do to comply with the law is to make up trains of such smaller number of cars as can be safely and properly handled without resorting to the use of hand brakes. In short, the mandate of the Congress is disregarded in this instance, not because compliance involves any physical difficulty which is inherent or practically serious, but merely because it involves some increase of expense. It is too plain for argument that no such reason can serve to condone disobedience to the command of the statute." In another action for the statutory penalties for requiring brakemen on a freight train to use the handholds, it was stipulated that the engine was properly equipped with the power driving wheel brake and appliances for operating the train brake system and that eighty-five per cent of the cars in the train were equipped with power brakes, as required by the order of the Interstate Commerce Commission pursuant to Section 2 of the 1903 amendment. The Federal District Court, under these facts, held that the statute did not either expressly or by implication prohibit the use of hand brakes in connection with the power brake system, but, in reversing this decision, the Federal Circuit Court of Appeals for the Ninth Circuit,<sup>17</sup> held that Section 1 of the original act, in connection with Section 2 of the Amendment of 1903, contemplated that the speed of a train should be controlled exclusively by the train brake system, and that the Act by its terms expressed with sufficient certainty the intention of Congress that hand brakes should not be used on freight trains. The

17. United States v. Great Northern R. Co., 144 C. C. A. 209, 229 Fed. 927, Judge Ross dissent-

ing. *Contra*; United States v. Baltimore & O. R. Co., 176 Fed. 114.

provision of Section 2 of the 1910 amendment requiring all cars to be equipped with "efficient hand brakes," the court held, was ascribable only to the necessity of controlling the movements of cars in yards and elsewhere where trains were being broken up or made up. In holding that train men were at no time permitted to use the hand brakes in ordinary trains movement, the court said: "By the Act Congress adopted for freight trains the system of braking that was in use on passenger trains. It made no specific mention of the number of cars in a train that should be equipped with power brakes, but it enacted in general terms that the train should be sufficiently equipped to be run without requiring the use of the common hand brake. The clause 'without requiring brakemen to use the common hand brakes,' as found in the first section of the act, is used in the same sense as the words 'without the necessity of men going between the end of the cars,' in the second section, which provides for automatic couplers. The language of the act was equivalent to declaring that after the date named freight trains should not only be equipped to run, but should actually be run without requiring brakemen to use the common hand brakes. No implication to the contrary is to be found in the provision in Section 2 that all cars must be equipped with 'efficient hand brakes,' a provision which is ascribable to the necessity of controlling the movement of cars in yards and elsewhere when trains have been broken up or are being made up. In an act, the express purpose of which is to relieve brakemen of the danger of using hand brakes, a provision that the train shall be so equipped as to run without requiring the use of hand brakes is a prohibition against the use of hand brakes in the ordinary movement of the trains. In view of the protection which was intended to be afforded by the act, it would have been idle for Congress to declare that freight trains must be equipped with appliances to operate a power brake system, and at the same time leave it optional with a railroad company to decide whether it would or would not operate its trains with that system. To

say that trains shall be provided with power brakes, and in the same breath to say that the carrier may refuse to use them, is to contradict the very purpose and terms of the act. Yet such is the effect of the law, if it be given the construction contended for by the defendant in error."<sup>18</sup>

**§ 803. Absolute Duty to Maintain Appliances in Repair Applies to Air Brakes.** Following its former decisions declaring that the duty to maintain couplers,<sup>19</sup> handholds,<sup>20</sup> and drawbars,<sup>21</sup> was mandatory and absolute, the United States Supreme Court has held that the same responsibility applies to air brakes on trains.<sup>22</sup> The question of negligence, therefore, is immaterial. Proof that the train brakes were defective or out of repair, shows a violation of the statute.

18. This case was reaffirmed on the second appeal: *Great Northern R. Co. v. United States*, 157 C. C. A. 32, 244 Fed. 406.

19. *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 559, 55 L. Ed. 582, 31 Sup. Ct. 612.

20. *Texas & P. R. Co. v. Riggsby*, 241 U. S. 33, 60 L. Ed. 874, 36 Sup. Ct. 482.

21. *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. Ed. 1061, 28 Sup. Ct. 616.

22. *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. Ed. 1125, 36 Sup. Ct. 683, 12 N. C. C. A. 1083; *Pennsylvania Co. v. United States*, 154 C. C. A. 526, 241 Fed. 824; *Chesapeake & O. R. Co. v. United States*, 141 C. C. A. 439, 226 Fed. 683; *Virginian R. Co. v. United States*, 139 C. C. A. 278, 223 Fed. 748; *United States v. Pere Marquette R. Co.*, 211 Fed. 220.

## CHAPTER XLIV.

### STATUTORY REQUIREMENTS AS TO AUTOMATIC COUPLERS.

- Sec. 804. The Statutory Provision.
- Sec. 805. Object of Congress in Requiring Automatic Couplers on Railroad Cars.
- Sec. 806. Illustrative Cases Showing Defective Couplers in Violation of Statute.
- Sec. 807. Failure of Coupler to Work Under all Circumstances Constitutes Violation of Statute.
- Sec. 808. Employees Entitled to Protection of Statute Requiring Automatic Couplers.
- Sec. 809. Trainmen on Top of Cars and not Actually Engaged in Coupling Them.
- Sec. 810. When Violation of Automatic Coupler Provision is not Actionable as to Employees Injured on Duty.
- Sec. 811. Employees Entering Between Cars for Other Purposes Than Coupling or Uncoupling.
- Sec. 812. Effect of Equipping Cars with Automatic Couplers of Different Patterns.
- Sec. 813. Coupler Provision Applies to all Cars on Interstate Highways by Rail.
- Sec. 814. Automatic Couplers Required in Switching Operations as well as in Line Movements.
- Sec. 815. Statute Applies to Coupling as well as to Uncoupling.
- Sec. 816. Coupling of Air and Steam Hose Between Cars no Part of Coupling Operation.
- Sec. 817. Operative Couplers Required at Both Ends of Cars.
- Sec. 818. Exception to the Foregoing—Conflicting Rulings.
- Sec. 819. Automatic Couplers not Required on Singly Operated Self-Propelled Trolley Cars.
- Sec. 820. Preparation of Car for Coupling, Part of Act Regulated by Statute.
- Sec. 821. That Coupling Could Have Been Automatically Effected by Using Lever on Other Side, no Defense.
- Sec. 822. Automatic Couplers not Required between Engine and Tender.
- Sec. 823. Actual Use of Coupler not Necessary to Constitute Offense.
- Sec. 824. Failure of Pin Lifter to Open Knuckles.
- Sec. 825. Illustrative Cases in Which Violations of Coupler Provision Held to be Proximate Cause of Injuries.
- Sec. 826. Forms of Instructions for Violation of Coupler Provision in Personal Injury Cases.
- Sec. 827. Model Couplers May be Exhibited to the Jury.

**§ 804. The Statutory Provision.** Section 2 of the original act of 1893 provided that after January 1, 1898, it should be unlawful for all common carriers by railroad engaged in interstate commerce, to haul or permit to be hauled or used on their lines any car used in moving interstate traffic, not equipped with couplers coupling automatically by impact and which can be uncoupled, without the necessity of men going between the ends of the cars.<sup>1</sup> This section has remained without change or amendment except that its wholesome requirements were extended in 1903 to all common carriers by railroad in the territories and the District of Columbia, and to all cars and similar vehicles used on any railroad engaged in interstate commerce and to all other locomotives, tenders, cars and similar vehicles used in connection therewith, excepting, however, those cars exempted by section 6 of the original act and cars used upon street railways.

**§ 805. Object of Congress in Requiring Automatic Couplers on Railroad Cars.** Before the general adoption by railroads of automatic couplers on cars in response to the congressional demand, cars were coupled with the

1. The absolute and mandatory duty to equip all cars on interstate lines with automatic couplers is discussed in the following cases: *Minneapolis & St. L. R. Co. v. Gotschall*, 244 U. S. 66, 61 L. Ed. 995, 37 Sup. Ct. 598, 14 N. C. C. A. 865; *Louisville & N. R. Co. v. Layton*, 243 U. S. 617, 61 L. Ed. 931, 37 Sup. Ct. 456; *Illinois Cent. R. Co. v. Williams*, 242 U. S. 462, 61 L. Ed. 437, 37 Sup. Ct. 128; *Atlantic City R. Co. v. Parker*, 242 U. S. 56, 61 L. Ed. 150, 37 Sup. Ct. 69; *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476, 60 L. Ed. 1110, 36 Sup. Ct. 626; *St. Louis & S. F. R. Co. v. Conarty*, 238 U. S. 243, 59 L. Ed. 1290, 35

Sup. Ct. 785; *United States v. Erie R. Co.*, 237 U. S. 402, 59 L. Ed. 1019, 35 Sup. Ct. 621; *Minneapolis, St. P. & S. S. M. R. Co. v. Popplar*, 237 U. S. 369, 59 L. Ed. 1000, 35 Sup. Ct. 609; *Pennell v. Philadelphia & R. R. Co.*, 231 U. S. 675, 58 L. Ed. 430, 34 Sup. Ct. 220; *Chicago Junct. R. Co. v. King*, 222 U. S. 222, 56 L. Ed. 173, 32 Sup. Ct. 79; *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 559, 55 L. Ed. 582, 31 Sup. Ct. 612; *Delk v. St. Louis & S. F. R. Co.*, 220 U. S. 580, 55 L. Ed. 590, 31 Sup. Ct. 617; *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363, 25 Sup. Ct. 158.



old link and pin couplers which required employes to stand or walk between the cars and to hold up the link and insert the pin as the coupling was being made. This was an extremely dangerous employment and thousands of railroad employes were killed and injured while engaged in coupling cars in this manner. The purpose of the enactment of the coupler provision was to eliminate the risk of injury by the absolute prohibition of the use of all cars not equipped with automatic coupling devices so that they might be either coupled or uncoupled, without the necessity of men going between the ends of the cars.<sup>2</sup> The statute is essentially a police regulation and its general purpose is the safe-guarding of employes from injury and death.

**806. Illustrative Cases Showing Defective Couplers in Violation of Statute.** In an action by the personal representative of a deceased brakeman against a common carrier by railroad, in which a recovery was sought because of a failure to comply with the automatic coupler section of the act, the defendant in the trial court, in the supreme court of the state and in the United States Supreme Court, where the case was taken by writ of error, urged that the evidence failed to show a defective coupler in violation of the statute. The testimony disclosed that the brakeman, while "kicking" a car to a siding, on giving the stop signal, attempted to uncouple the head car by pulling the coupling pin repeatedly with the lifter at the end of the next car, without success. The conductor, who examined the coupling apparatus soon after the accident, testified that it worked with difficulty and that he considered it a "bad coupler." These facts, the courts held, were enough to permit the case to go to the jury upon the question

2. *United States v. Philadelphia & R. Ry. Co.* 223 Fed. 215; *United States v. Atlantic Coast Line R. Co.* 214 Fed. 498; *Voelker v. Chicago, M. & St. P. Ry. Co.*, 116 Fed. 867; *United States v. Chi-*

*cago Great Western Ry. Co.*, 162 Fed. 775; *La Mere v. Railway Transfer Co. of the City of Minneapolis*, 125 Minn. 159, Ann. Cas. 1915C 607, 145 N. W. 1068.

whether the coupler was defective within the meaning of the act.<sup>3</sup> In another case, an attempt was made to couple a switch engine to a box car, and, on the first impact, it did not couple automatically. A brakeman standing on the footboard then signalled the engineer to pull ahead, and, this having been done, he adjusted the knuckle and pin upon the box car and gave the engineer a back-up signal to couple in again. He then got back on the foot-board of the engine, and, as he did so, looked down and saw the drawhead on the engine was shifted over to one side. He reached with his left foot to move the drawhead over so it would couple, and his right foot slipped, and he was injured. Upon these facts, the court held that the car was not equipped with couplers coupling automatically by impact without the necessity of men going between the ends of the cars.<sup>4</sup> An engine was backed for the purpose of being coupled to a car and failed to couple automatically by impact. Thereupon, an employe of the carrier, noticing that the drawhead was not in line with the one on the engine, put in his arm for the purpose of straightening it and thus make the coupling possible. His arm was caught and crushed. In holding that there was sufficient evidence for the jury of a violation of the coupler statute for the case to be submitted to the jury, the national Supreme Court said:<sup>5</sup> "If there was evidence that the railroad failed to furnish such 'couplers coupling automatically by impact' as the statute requires (Johnson v. Southern Pacific Co., 196 U. S. 1, 18, 19), nothing else needs to be considered. We are of opinion that there was enough evidence to go to the jury upon that point. No doubt there are arguments that the jury should have decided the other way. Some lateral play must be allowed to drawheads, and further, the car was on a curve, which of course, would tend to throw

3. Minneapolis, St. P. & S. S. M. Ry. Co. v. Popplar, 237 U. S. 369, 59 L. Ed. 1000, 35 Sup. Ct. 609, aff'g 121 Minn. 413, Ann. Cas. 1914D 383, 141 N. W. 798.

4. San Antonio & A. P. R. Co.

v. Wagner, 241 U. S. 476, 60 L. Ed. 1110, 36 Sup. Ct. 626.

5. Atlantic City R. Co. v. Parker, 242 U. S. 56, 61 L. Ed. 150, 37 Sup. Ct. 69.

the coupler out of line. If couplers failed to couple automatically upon a straight track it at least may be said that a jury would be warranted in finding that a lateral play so great as to prevent coupling was not needed, and that, in the absence of any explanation believed by them, the failure indicated that the railroad had not fully complied with the law." As the statute imposes a positive duty to furnish safety appliances for the coupling of cars, negligence may be inferred when a train in motion separated because of the opening of a coupler on one of the cars, resulting in an automatic setting of the emergency brakes and a sudden jerk which threw a brakeman, who was riding on top of one of the cars, off the train.<sup>6</sup>

**§ 807. Failure of Coupler to Work Under all Circumstances Constitutes Violation of Statute.** To comply with the Act the coupler on a car must be such that it will couple automatically at all times and places and under all circumstances.<sup>7</sup> That the coupler would not

6. Minneapolis & St. L. R. Co. v. Gotschall, 244 U. S. 66, 14 N. C. C. A. 865, 61 L. Ed. 995, 37 Sup. Ct. 598.

7. United States. Atlantic City R. Co. v. Parker, 242 U. S. 56, 61 L. Ed. 150, 37 Sup. Ct. 69; Delk v. St. Louis & S. F. R. Co., 220 U. S. 580, 55 L. Ed. 590, 31 Sup. Ct. 617; United States v. Chesapeake & O. R. Co., 130 C. C. A. 262, 213 Fed. 748; Chicago, B. & Q. R. Co. v. United States, 127 C. C. A. 438, 211 Fed. 12; Hohenleltner v. Southern Pac. Co., 177 Fed. 796; Chicago Junction R. Co. v. King, 94 C. C. A. 652, 169 Fed. 372; United States v. Atchison, T. & S. F. Ry. Co., 167 Fed. 696; United States v. Nevada County Narrow Gauge R. Co., 167 Fed. 695; United States v. Louisville & N. R. Co., 162 Fed. 185.

Arkansas. St. Louis & S. F. R. Co. v. Conarty, 106 Ark. 421, 155 S. W. 93; York v. St. Louis, I. M. & S. R. Co., 86 Ark. 244, 110 S. W. 803.

Kentucky. Nashville, C. & St. L. Ry. v. Henry, 158 Ky. 88, 164 S. W. 310.

Minnesota. Davis v. Minneapolis & St. L. R. Co., 134 Minn. 369, 159 N. W. 802; La Mere v. Railway Transfer Co. of the City of Minneapolis, 125 Minn. 159 Ann. Cas. 1915C 607, 145 N. W. 1068; Willett v. Illinois Cent. R. Co., 122 Minn. 513, 4 N. C. C. A. 479, 142 N. W. 883; Demerce v. Minneapolis, St. P. & S. S. M. R. Co., 122 Minn. 171, 142 N. W. 145; Popplar v. Minneapolis, St. P. & S. S. M. R. Co., 121 Minn. 413, Ann. Cas. 1914D 383, 141 N. W. 798; Burho v. Minneapolis &

work because of a curve in the track is no defense even though it would couple automatically on a straight track.<sup>8</sup> Nor can the carrier exonerate itself by showing

St. L. R. Co., 121 Minn. 326, 141 N. W. 300.

**Missouri.** Christy v. Wabash R. Co., — Mo. App. —, 191 S. W. 241; Moore v. St. Joseph & G. I. R. Co., 268 Mo. 31, 186 S. W. 1035; Noel v. Quincy, O. & K. C. R. Co., — Mo. App. —, 182 S. W. 787; Johnston v. Chicago Great Western R. Co., — Mo. App. —, 164 S. W. 260; Shohoney v. Quincy, O. & K. C. R. Co., 223 Mo. 649, 122 S. W. 1025.

**North Carolina.** Montgomery v. Carolina & N. W. R. Co., 163 N. C. 597, 80 S. E. 83.

**Pennsylvania.** Moyer v. Pennsylvania R. Co., 247 Pa. 210, 93 Atl. 282.

**Texas.** San Antonio & A. P. Ry. Co. v. Wagner, — Tex. Civ. App. —, 166 S. W. 24.

**Virginia.** Southern R. Co. v. Simmons, 105 Va. 651, 55 S. E. 459.

"A tender and car would not have coupled without his having put his arm in for the purpose of manipulating the couplings. It is not an answer to say that the couplers would have worked if the car had been on a straight track for the Supreme Court of the United States in *Chicago, Rock Island & Pacific Ry. Co. v. Brown*, 229 U. S. 317, observed at p. 320, 33 Sup. Ct. 840, 57 L. Ed. 1204 that it was conceded that in the Taylor Case, *supra*, and in *Chicago, B. & Q. Ry. Co. v. United States*, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582, that that court settled that the failure of a coupler to work at

any time sustained a charge of negligence in that respect, etc." *Parker v. Atlantic City R. Co.*, 87 N. J. L. 148, 93 Atl. 574.

8. "There is no charge in the complaint that the cars were not provided with couplers which would couple by impact when brought together, but the averment is that the lead track in the yards, where the plaintiff's intestate was at work at the time of his death, had a curve of about 200, so that when the couplers in use on the cars by which he was killed met they passed by each other and would not couple without a person going between the cars to adjust them, and that while the deceased was between the cars for that purpose he was struck and killed. \* \* \* The cars must not only be provided with couplers, but the couplers must be such that when used they will couple together automatically. If the cars hauled or used by a carrier engaged in such commerce will not so couple, the law is violated, whether it is due to the character of the car, the kind of equipment used, or, in my opinion, the manner in which track employees are required to use in coupling or uncoupling cars or making up trains are located or built. The ultimate end sought by the law is the coupling and uncoupling of cars used in interstate traffic without the necessity of going between them. This is the test of the compliance with it. As repeatedly pointed out by the courts, especially the Supreme

that the cars were loaded with lumber or other material projecting beyond their ends so as to preclude the automatic operation of such couplers.<sup>9</sup> A coupler, to comply with the act, must be one which, when operated in the manner intended, performs its functions under all ordinary conditions under which couplings or uncouplings are made in railroad work.<sup>10</sup>

**§ 808. Employees Entitled to Protection of Statute Requiring Automatic Couplers.** Interstate carriers by railroad are liable to employees in damages whenever the failure to obey the statute requiring automatic couplers is the proximate cause of injury to them when engaged in the discharge of their duties.<sup>11</sup> The question when a violation of the statute is or is not a proximate cause of an injury must be determined in the light of the federal decisions construing its meaning under the common law.<sup>12</sup> While the act requires cars to be

Court in the Johnson Case (196 U. S., 1), the design is to prevent the necessity of railroad employees going between cars in order to make a coupling, and thus protect their lives and limbs. The point to be accomplished by the law is that employees of railroad companies engaged in interstate commerce shall not be required to go between the cars for the purpose of coupling or uncoupling them, and this would be circumvented if the companies are permitted to so construct and maintain their tracks in yards or depot grounds, or other places where employees are required, in the course of their employment, to couple or uncouple cars, in such a condition that the cars used by them will not couple automatically with the equipment provided."—Hohenleitner v. Southern Pac. Co., 177 Fed. 796.

9. United States v. Illinois

Cent. R. Co., 101-C. C. A. 15, 177 Fed. 801.

10. Davis v. Chicago, R. I. & P. R. Co., 134 Minn. 49, 158 N. W. 911.

11. Louisville & N. R. Co. v. Layton, 243 U. S. 617, 61 L. Ed. 931, 37 Sup. Ct. 456, aff'g 145 Ga. 886, 90 S. E. 53; Great Northern R. Co. v. Wiles, 240 U. S. 444, 60 L. Ed. 732, 36 Sup. Ct. 406, rev'g 125 Minn. 348, 5 N. C. C. A. 60, 147 N. W. 427; St. Louis & S. F. R. Co. v. Conarty, 238 U. S. 243, 59 L. Ed. 1290, 35 Sup. Ct. 785, rev'g 106 Ark. 421, 155 S. W. 93; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. Ed. 1179, 33 Sup. Ct. 858, rev'g 145 Ky. 427, 140 S. W. 672.

12. St. Louis & S. F. R. Co. v. Conarty, 238 U. S. 243, 59 L. Ed. 1290, 35 Sup. Ct. 785, reversing 106 Ark. 421, 155 S. W. 93; Milwaukee & St. P. R. Co. v.

equipped with couplers which couple automatically without the necessity of men going between the ends of the cars, the statute is not intended solely for the benefit of employes injured when between cars for the purpose of coupling or uncoupling them.<sup>13</sup> The design of the statute is broader and its protection extends to employes of an interstate carrier engaged in the operation and the movement of cars even though they are not actually engaged in coupling cars. "While it is undoubtedly true that the immediate occasion for passing the laws requiring automatic couplers was the great number of deaths and injuries caused to employees who were obliged to go between cars to couple and uncouple them, yet these laws as written are by no means confined in their terms to the protection of employees only when so engaged. The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars not equipped as required,—not from the position the employes may be in, or the work which he may be doing at the moment when he is injured."<sup>14</sup>

**§ 809. Trainmen on Top of Cars and not Actually Engaged in Coupling Them.** Although the statute prescribes that couplers shall be provided so that cars may be coupled together without the necessity of men going between the ends of the cars, employes of common carriers by railroad are under the protection of the coupler provision of the act while on top of cars and assisting in making up trains if the injuries sustained are a proximate result of a violation of the statute. For example, a brakeman who went upon the top of a car in a railroad yard to release the hand brakes so that a switch engine might couple thereto and remove

Kellogg, 94 U. S. 469, 24 L. Ed. 256. C. C. A. 865.

13. Minneapolis & St. L. R. Co. v. Gotschall, 244 U. S. 66, 61 L. Ed. 995, 37 Sup. Ct. 598, 14 N.

14. Louisville & N. R. Co. v. Layton, 243 U. S. 617, 61 L. Ed. 931, 37 Sup. Ct. 456, aff'g 145 Ga. 886, 90 S. E. 53.

it to another track, was within the protection of the coupler provision statute when the engine failed to couple automatically to the car because of a defect in the coupler, causing the car to move and to strike violently against other cars standing on the same track.<sup>15</sup> In another case, it appeared that a brakeman while riding on top of the cars of a freight train was thrown off and under the wheels when the train separated while in motion because of the opening of a coupler on one of the cars resulting in an automatic setting of the emergency brakes and a sudden jerk of the train. The injury and subsequent death were properly held to be a proximate result of a violation of the statute.<sup>16</sup>

**§ 810. When Violation of Automatic Coupler Provision is not Actionable as to Employees Injured on Duty.** When a duty is imposed for the protection of persons in particular situations or relations, a breach of that duty which results in injury to one in an altogether different situation or relation is not, as to him, actionable.<sup>17</sup> This rule was enforced by the national Supreme Court in the case cited, and a recovery was denied the administrator of an employe who, while riding on the foot-board of a switch engine, was crushed and killed in a collision between the switch engine and

15. *Louisville & N. R. Co. v. Layton*, 243 U. S. 617, 61 L. Ed. 931, 37 Sup. Ct. 456, aff'g. 145 Ga. 886, 90 S. E. 53.

16. *Minneapolis & St. L. R. Co. v. Gotschall*, 244 U. S. 66, 61 L. Ed. 995, 38 Sup. Ct. 598, 14 N. C. C. A. 865.

17. *St. Louis & S. F. R. Co. v. Conarty*, 238 U. S. 243, 59 L. Ed. 1290, 35 Sup. Ct. 785, rev'g 106 Ark. 421, 155 S. W. 93; *The Eugene F. Moran v. New York Cent. & H. R. R. Co.*, 212 U. S. 466, 53 L. Ed. 600, 29 Sup. Ct. 339; *Gorris v. Scott*, L. R. 9 Ex. 125, 43 L. J. Ex. 92, 30 L. T. 431, 22 Wkly. Rep. 575; *Ward v. Hobbs*,

L. R. 4 App. Cas. 13, 48 L. J. Q. B. 281, 40 L. T. 73, 27 Wkly. Rep. 114, 3 Eng. Rul. Cas. 125; *Williams v. Chicago & A. R. Co.*, 135 Ill. 491, 11 L. R. A. 352, 25 Am. St. Rep. 397, 26 N. E. 661, aff'g 32 Ill. App. 339; *O'Donnell v. Providence & W. R. Co.*, 6 R. I. 211; *Metallic Compression Casting Co. v. Fitchburg R. Co.*, 109 Mass. 277, 12 Am. Rep. 689; *Favor v. Boston & I. R. Corporation*, 114 Mass. 350, 19 Am. Rep. 364; *East Tennessee, V. & G. R. Co. v. Feathers*, 10 Lea. (Tenn.) 103. See also *Johnson v. Great Northern R. Co.*, 102 C. C. A. 89, 178 Fed. 643.

a car not equipped with a drawbar and coupler though the evidence disclosed that had the appliances been in place, they would have kept the engine and car sufficiently apart for him to have avoided the injury. The decedent was not intending to or attempting to couple the car to the engine or to handle it in any way, but was on his way to some other part of the yard to do some switching. Said the court: "The principal question in the case is whether at the time he was injured the deceased was within the class of persons for whose benefit the Safety Appliance Acts required that the car be equipped with automatic couplers and drawbars of standard height; or, putting it in another way, whether his injury was within the evil against which the provisions for such appliances are directed. It is not claimed, nor could it be under the evidence, that the collision was proximately attributable to a violation of those provisions, but only that had they been complied with, it would not have resulted in injury to the deceased. It therefore is necessary to consider with what purpose couplers and drawbars of the kind indicated are required, for where a duty is imposed for the protection of persons in particular situations or relations, a breach of it which happens to result in injury to one in an altogether different situation or relation is not as to him actionable. . . . We are of opinion that the deceased, who was not endeavoring to couple or uncouple the car or to handle it in any way but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar operated as a breach of a duty imposed for his benefit, and that the Supreme Court of the State erred in concluding that the Safety Appliance Acts required it to hold otherwise."

**§ 811. Employes Entering Between cars for Other Purposes than Coupling or Uncoupling.** The Supreme Court of Minnesota, in an action under the Federal Safety Appliance Act, held that if an employe goes between the ends of cars for a purpose not connected with the duty of coupling or uncoupling of the cars, he is not



within the protection of the statute for the reason that, under such circumstances, if injured, it could not be held that the defective coupler was the proximate cause of his misfortune.<sup>18</sup> In that case it appeared that the rules of the railroad company prohibited men from going between moving cars. An employe, while moving a car in a switch yard, stepped in front of the car while it was between 300 and 400 feet from the car to which it was to be coupled, for the purpose of opening the knuckle. In deciding that the employe, in attempting to open the knuckle under such circumstances was engaged in the act of coupling, the court said: "The close question in the case is one of fact—whether, in going in front of the car to open the knuckle, the plaintiff could be said to be engaged in making a coupling; or, in other words, was the situation such that plaintiff's duties required him to then go in front of the car to attempt to open the knuckle; it is clear that if the plaintiff, out of idle curiosity, tried to open the knuckle, or for any reason not connected with the duty to make a coupling, it could not be held that the defective coupler was the proximate cause of his misfortune. 'Going between moving cars to couple or uncouple is positively forbidden' was a rule of the defendant of which the plaintiff had knowledge, and, as above stated, the court instructed the jury that disobedience of this rule defeated the right to recover, unless the jury found that the plaintiff was then engaged in making a coupling, and, owing to the failure of the coupler to work, it was necessary to go in front of the moving car to open the knuckle. When the accident happened, the car was between 300 and 400 feet from the car to which it was to be coupled. A coupling cannot be made unless the knuckle on one of the two cars to be coupled is open. The object of the crew was to send this car down with force sufficient to couple it by the impact with the train left standing on the passing track. Before the plaintiff left the car, and before it came in contact with

18. *Burho v. Minneapolis & St. L. R. Co.*, 121 Minn. 326, 141 N. W. 300.

the standing train, the knuckle was to be opened. It would seem not very important at what particular point the work was done, so long as the necessity of its doing arose from the defective coupler. The contention of defendant that plaintiff could have run ahead of the car and opened the knuckle of the standing car is of no merit. At the most, it goes to plaintiff's contributory negligence, which is not defensive matter in these actions. We think there was evidence to sustain the finding of the jury that plaintiff was engaged in making a coupling, at the time he was injured, in the customary way of making it, when a coupler fails to work properly."

**§ 812. Effect of Equipping Cars with Automatic Couplers of Different Patterns.** In an early decision construing the original Safety Appliance Act, the federal Circuit Court of Appeals held that the statute was not violated where two cars were equipped with automatic couplers and would not couple automatically by impact because the two were of different patterns or kinds.<sup>19</sup> "But", said the Supreme Court in passing on the same case on writ of error, "we think that what the act plainly forbade was the use of cars which could not be coupled together automatically by impact, by means of the couplers actually used on the cars to be coupled. The object was to protect the lives and limbs of railroad employes by rendering it unnecessary for a man operating the couplers to go between the ends of the cars, and that object would be defeated, not necessarily by the use of automatic couplers of different kinds, but if those different kinds would not automatically couple with each other. The point was that the railroad companies should be compelled, respectively, to adopt devices, whatever they were, which would act so far uniformly as to eliminate the danger consequent on men going between the cars. If the language used were open to construction, we are constrained to say that the

19. *Johnson v. Southern Pac. Co.*, 54 C. C. A. 508, 117 Fed. 462.

construction put upon the act by the Circuit Court of Appeals was altogether too narrow."<sup>20</sup>

**§ 813. Coupler Provision Applies to all Cars on Interstate Highways by Rail.** The coupler provision of the Safety Appliance Act as amended in 1903 applies, in all cases, to all cars, locomotives, tenders and similar vehicles on any railroad engaged in interstate commerce and to all locomotives, tenders, cars and similar vehicles used in connection therewith without reference to whether the couplers brought together are of the same kind, make or type, or whether the particular vehicles are, at the time, employed in interstate commerce or not.<sup>21</sup>

**§ 814. Automatic Couplers Required in Switching Operations as Well as in Line Movements.** The automatic coupler provision of the statute has a broader application than the train brake provision, for it embraces all switching movements as well as train operations. The air brake provision deals with the running of a train but the automatic coupler provision relates to the hauling or using of a car. In the former a train is a unit and in the other a car.<sup>22</sup> "To hold that the

20. *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363, 25 Sup. Ct. 158.

21. *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476, 60 L. Ed. 1110, 36 Sup. Ct. 626; *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. Ed. 874, 36 Sup. Ct. 482; *Chicago, R. I. & P. R. Co. v. Brown*, 229 U. S. 317, 57 L. Ed. 1204, 33 Sup. Ct. 840, 3 N. C. C. A. 826; *Southern R. Co. v. United States*, 222 U. S. 20, 56 L. Ed. 72, 32 Sup. Ct. 2, 3 N. C. C. A. 822; *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363, 25 Sup. Ct. 158.

*In Rio Grande Southern R. Co.*

*v. Campbell*, 44 Colo. 1, 96 Pac. 986, the court erroneously decided that the statute did not apply unless the car was loaded with interstate freight.

22. *United States v. Erie R. Co.*, 237 U. S. 402, 59 L. Ed. 1019, 35 Sup. Ct. 621, in which the court said: "The other provisions calling for automatic couplers and grab irons are of broader application and embrace switching operations as well as train movements, for both involve a hauling or using of cars." To the same effect are the following cases: *Minneapolis, St. P. & S. S. M. R. Co. v. Popplar*, 237 U. S.

words 'while such car was being used by such carrier upon its line of railroad' are intended to limit the statute in its application to the main line, would in a large degree nullify the act. When we consider the statute in regard to safety appliances, we are forced to the conclusion that it must have been the intention of Congress that the same should apply to sidetracks and yard tracks as well as main lines.'<sup>23</sup>

**§ 815. Statute Applies to Coupling as well as to Uncoupling.** In the early litigation involving the statute, an attempt was made to construe the provision forbidding men to go between the ends of the cars as applicable solely to the uncoupling operation. It was contended that the clause "without the necessity of men going between the ends of the cars" modified the word

369, 59 L. Ed. 1000, 35 Sup. Ct. 609; *Southern R. Co. v. Crockett*, 234 U. S. 725, 58 L. Ed. 1564, 34 Sup. Ct. 897; *Chicago Junct. R. Co. v. King*, 222 U. S. 222, 56 L. Ed. 173, 32 Sup. Ct. 79; *Southern R. Co. v. United States*, 222 U. S. 20, 56 L. Ed. 72, 32 Sup. Ct. 2, 3 N. C. C. A. 822; *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 559, 55 L. Ed. 582, 31 Sup. Ct. 612; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. Ed. 1061, 28 Sup. Ct. 616; *Schlemmer v. Buffalo, R. & P. R. Co.*, 205 U. S. 1, 51 L. Ed. 681, 72 Sup. Ct. 407, also the same case again reported in 220 U. S. 590, 55 L. Ed. 596, 31 Sup. Ct. 561; *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363, 25 Sup. Ct. 158; *Chicago, B. & Q. R. Co. v. United States*, 127 C. C. A. 438, 211 Fed. 12; *United States v. Western & A. R. Co.*, 184 Fed. 336; *Erie R. Co. v. Russell*, 183 Fed. 722; *Johnson v. Great Northern R. Co.*, 120 C. C.

A. 89, 178 Fed. 643; *Chicago, M. & St. P. Ry. Co. v. United States*, 91 C. C. A. 373, 165 Fed. 423, 20 L. R. A. (N. S.) 473; *United States v. Pittsburgh, C., C. & St. L. Ry. Co.*, 143 Fed. 360.

"It would be a narrow and limited construction of this statute to say that it was only applicable in cases where the cars at the very moment of the injury are being actually used in moving interstate traffic, and not to cars where the injury occurs in the making up of a train of cars for the purpose of moving interstate traffic. The language employed in the statute, as well as the beneficent purpose for which it was intended—the preservation of human life—forbids an interpretation so narrow." *Dowdell, J., in Mobile, J. & K. C. R. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395.

23. *United States v. Chesapeake & O. R. Co.*, 130 C. C. A. 262, 213 Fed. 748.

"uncoupling" only and that the statute did not forbid employes from going between the ends of the cars when coupling them together. But the courts, in giving effect to the plain and apparent purpose of the statute, removed the uncertainty of its meaning by holding that a comma should be inserted after the word "uncoupling." So construed, the last clause of Section 2 plainly modifies and applies to the coupling as well as the uncoupling.<sup>24</sup>

**§ 816. Coupling of Air and Steam Hose Between Cars No Part of Coupling Operation.** While the statute forbids railroad employes from going between cars to couple them, the coupling of air and steam hose is no part of the coupling apparatus within the meaning of the statute, and hence it is not a violation of law for employes to go between cars to connect the air and steam hose.<sup>25</sup> The statute has been so construed by the Interstate Commerce Commission, which is the governmental body charged with the execution of the Safety Appliance Act. In its annual report for the year 1907, the Commission said: "There should also be an amendment to the law requiring the use of automatic steam hose couplers. The vast increase in the number of air brakes has enormously increased the danger to which the men are subjected by going between the cars to couple and uncouple hose. Many casualties are due to this cause and as automatic appliances for the connection of steam and air hose are no longer an ex-

24. *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363, 25 Sup. Ct. 158, in which Chief Justice Fuller said: "We dismiss as without merit the suggestion, which has been made with the words 'without the necessity of men going between the ends of the cars' which are the test of compliance with Section 2, apply only to the act of uncoupling. The phrase literally covers both coupling and uncoupling, and if read, as it should

be, with a comma after the word 'uncoupled' this becomes entirely clear." To the same effect are *United States v. Nevada County Narrow Gauge R. Co.*, 167 Fed. 695; *Chicago M. & St. P. R. Co. v. Voelker*, 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264; *Montgomery v. Carolina & N. W. R. Co.*, 163 N. C. 597, 80 S. E. 83.

25. *Yost v. Union Pac. R. Co.*, 245 Mo. 219, 149 S. W. 577.

periment, it is believed that their use may properly be enforced by 'law.' No such amendment has as yet been passed by Congress. The charge of Judge Dodge, therefore, to a jury, in *United States v. Boston & M. R. Co.*,<sup>26</sup> to the effect that an employe connecting or disconnecting the air hose between cars is engaged in coupling or uncoupling cars within the meaning of the connect the hose, in order to connect or disconnect the statute if it is necessary for him to connect or disconnect, is an erroneous interpretation of the statute.

**§ 817. Operative Couplers Required at Both Ends of Cars.** The statute prohibits the movement or use of any car not equipped with "couplers" which can be coupled and uncoupled, without the necessity of men going between the "ends" of the cars. This congressional direction means that every common carrier subject to the act must equip its cars so that there shall be automatic couplers at both ends. The statute requires that each car taken separately shall be completely equipped, that is, couplers at both ends must be in good order.<sup>27</sup>

26. 168 Fed. 148.

27. *United States v. Philadelphia & R. Ry. Co.*, 223 Fed. 215; *United States v. Southern Ry. Co.*, 170 Fed. 1014; *United States v. Baltimore & O. R. Co.*, 170 Fed. 456; *United States v. Southern Pac. Co.*, 167 Fed. 699; *United States v. Atchison, T. & S. F. Ry. Co.*, 167 Fed. 696; *United States v. Denver & R. G. R. Co.*, 90 C. C. A. 329, 163 Fed. 519; *United States v. Louisville & N. R. Co.*, 162 Fed. 185; *United States v. Philadelphia & R. Ry. Co.*, 160 Fed. 696; *United States v. Central of Georgia Ry. Co.*, 157 Fed. 893.

"The meaning of that section is clear enough. The direction of Congress is that any common

carrier, such as a railroad, must equip its cars so there shall be at both ends a coupler which will couple automatically by impact when it comes in contact with another car, and which may be uncoupled also from the side without the necessity of a man going between the ends of the two cars in order to perform that operation. That requires that each car taken separately shall be complete—completely equipped; that is to say, that one coupler should be in good order and the other should be defective, although it appears from the testimony in the case that under certain circumstances even if one of the couplers is defective the process of coupling

**818. Exception to the Foregoing—Conflicting Rulings.** But the Federal Circuit Court of Appeals for the Seventh Circuit has decided that the rule laid down in the preceding paragraph does not apply to a locomotive engine used in interstate commerce where the coupler at one end was never used or intended to be used, the lock chain having been disconnected and the knuckle removed so that no car could be coupled to the engine at that end or uncoupled therefrom.<sup>28</sup> The

may nevertheless take place provided the coupler upon the car with which the defective car comes in contact is in good order. If the two ends that come together were both out of order then the coupling could not take place automatically, but if one of them is in good order while the other is not, then, under certain circumstances, the coupling may take place automatically just the same as though both cars were thoroughly equipped. But, however that may be, the Act of Congress does not permit such a situation to exist. It requires that each car taken by itself shall have the couplers at both ends in good order, so that at each end the coupler may perform its service in the manner directed by the statute—that is to say, automatically by the impact of the two cars.”—Charge of Judge McPherson in *United States v. Philadelphia & R. Ry. Co.*, *supra*.

“The Safety Appliance Act requires that each coupler on a car be operative in itself, so that an employe will not have to go to another car to couple and uncouple the car in question. The provisions as to coupling and uncoupling apply to the coupler on each end of every car subject to

the law. It is wholly immaterial in what condition was the coupler of the adjacent car or any other car or cars to which each car sued upon was, or was to be, coupled. The equipment on each end of these two cars must be in such condition that whenever called upon for use it can be operated without the necessity of men going between the ends of the cars.”—Hundley, J., in *United States v. Central of Ga. Ry. Co.*, *supra*.

28. *Wabash R. Co. v. United States*, 97 C. C. A. 284, 172 Fed. 864, wherein the court said: “The argument of the Government may be reduced to this syllogism: The Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat., 379 (U. S. Comp. St. 1901, p. 3154) amended by Act June 29, 1906, c. 3591, 34 stat. 584 (U. S. Comp. St. Supp. 1907, p. 892) requires that every ‘car’ used in moving interstate traffic shall be equipped with ‘couplers’ coupling automatically with impact; the Supreme Court has held in *Johnson v. Southern Pacific Company*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, that a locomotive engine is a car within the meaning of the statute; therefore, locomotive engines must be equipped with

Federal Circuit Court of Appeals for the Ninth Circuit, in an opinion that seems more in harmony with the interpretation and construction given the Safety Appliance Act by the supreme court, disapproved this rule although the facts in the case before it were not similar, as the railroad company was attempting to use a defective coupler at the end of the engine in question.<sup>29</sup>

**§ 819. Automatic Couplers not Required on Singly Operated Self-Propelled Trolley Cars.** While the second

'couplers' and in as much as 'couplers' means more than one coupler, and if more than a coupler on the tender is used the other must be used on the B end of the engine, therefore, an engine unequipped with a coupler at its B end, in accordance with the requirements of the Act, is a violation of the Act. The difficulty with this reasoning is, first, in the assumption that under the doctrine of the Johnson Case a locomotive and a car are synonymous terms in every respect and for every purpose—a rigidity of construction that the Supreme Court never intended; and the second difficulty is, in the assumption that, because couplers, in the statute, is in the plural, there can be no car without a coupler at each end, irrespective of the use to which such car is put. As was said by the Supreme Court in the Johnson Case, the primary object of the act was to promote the public welfare by securing the safety of employees and travelers. Its design to give relief was more dominant than to inflict punishment—a view of the statute is wholly irreconcilable with a construction that would require the designated couplers to be

placed where they were never used or intended to be used.

29. Chicago, M. & P. S. R. Co. v. United States, 116 C. C. A. 444, 196 Fed. 882.

Judge Dickinson, in *United States v. Philadelphia & R. Ry. Co.*, 223 Fed. 215, decides that there is no inconsistency between these two rulings. He said: "We have for our guidance to the proper answer to this question the ruling that a car intended in its use to be coupled at either end must have a coupling device at each end (*U. S. v. P. & R. Ry. Co.* (D. C.) 160 Fed. 696), and the further ruling that a locomotive engine need not be designed and constructed so that cars may be coupled to it at its front end (*Wabash R. Co. v. U. S.* 172 Fed. 864, 97 C. C. A. 284). There is no inconsistency in these two rulings. It is the use of the car which controls, and therefore the intended use which determines the equipment. The facts of this case suggest these observations. The requirement of the law is not that some kind of coupling device shall be provided so that cars may be coupled without risk to human life or limb, but the requirement is that no



section of the original statute declared it to be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line, any car used in moving interstate traffic not equipped with automatic couplers, the Federal Circuit Court of Appeals for the second circuit, has held that the statute does not apply to a self-propelled trolley car being operated without any connection with other cars.<sup>30</sup> "It seems to us," said the court, "that a fair reading of section 2, which renders it unlawful for improperly equipped cars 'to be hauled or used' on any line engaged in interstate commerce, shows (as does the title of the act) that the mischief intended to be reached consisted in using cars that were to be hauled, and not to vehicles self-propelled, and neither hauled by any other vehicle, nor themselves engaged in hauling. We are therefore of opinion that a verdict should not have been directed against the defendant below in respect to those trolley cars operating singly at the time of the alleged offense, and not shown to be used in trains. But when such cars are coupled together, and, so coupled, engaged in interstate commerce, they are in our opinion within the purview of the statute. The degree of danger attending the coupling of such cars, the difficulty of arranging a proper automatic system, and the amount of hauling done when each car takes power through its own trolley, are not matters for the court. We hold no more than that singly operated cars, not used in trains, nor hauled, are to be held to the requirement of automatic couplers, for the reason (summarily stated) that there would be no use for such a contrivance if it existed and that Congress can be held to have decreed no such absurdity."

**§ 820. Preparation of Car for Coupling, Part of Act Regulated by Statute.** Before the act of coupling two cars is actually commenced, employes have some-

car shall be used unless it has the equipment called for by the act."

30. *International R. Co. v. United States*, 151 C. C. A. 333, 238 Fed. 317.

times been required to go to the end of a car to prepare the coupler for the impact. It has been urged that such a preparation of the car is not forbidden by the statute if the car, when so prepared, will couple automatically. However, the preparation of the coupler and the impact itself, it has been held, are not isolated acts, but are connected and indivisible parts of the coupling operation within the purview of the statute.<sup>31</sup> Thus, while two cars were standing about ten feet apart in a railroad yard, a switchman stepped to the end of one of the cars to adjust the coupler preparatory to the coupling itself. It was held that his act was forbidden by the statute.<sup>32</sup> In another case the same rule was applied in an instruction to the jury as follows: "The jury is instructed that if it believes from a preponderance of the evidence that the defendant hauled the car, as alleged in the first count of plaintiff's petition, when the coupling and uncoupling apparatus on either end of said car was so constructed that, in order to open the knuckle when preparing the coupler for use, it was reasonably necessary for a man to place part of his body, his arm, or his leg in a hazardous or dangerous position, then its verdict should be for the government."<sup>33</sup>

**§ 821. That Coupling Could Have Been Automatically Effected by Using Lever on Other Side, No Defense.** The construction of railroad cars is such that frequently a coupling between an inoperative coupler and an operative one, can be automatically effected by impact without the necessity of a man going between the

31. *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363, 25 Sup. Ct. 158; *Chicago, M. & St. P. R. Co. v. Voelker*, 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264; *Philadelphia & R. R. Co. v. Winkler*, 4 Penneville's (Del.) 387, 56 Atl. 112; *Grand Trunk Western R. Co. v. Poole*, 175 Ind. 567, 93 N. E. 26; *Burho v. Minneapolis & St. L. Ry. Co.*, 121 Minn.

326, 141 N. W. 300; *San Antonio & A. P. Ry. Co. v. Wagner*, — Tex. Civ. App. —, 166 S. W. 24; *Southern R. Co. v. Simmons*, 105 Va. 651, 55 S. E. 459.

32. *Chicago, M. & St. P. R. Co. v. Voelker*, 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264.

33. *United States v. Nevada County Narrow Gauge R. Co.*, 167 Fed. 695.

ends of the cars if the lever on the opposite side of the adjacent car is used; but the statute does not contemplate that railroad employes should be required to go around, over or under the cars in order to operate the coupler from the other side on the adjacent car. The statute requires each car to be equipped so that it can be coupled automatically without the necessity of a man stepping between the ends of the cars. The mere fact that the coupler on the adjacent car can be so manipulated that it can be coupled therewith without a man going between the ends of the cars, if the employe goes on the other side, is no defense.<sup>34</sup>

34. *Chicago, B. & Q. R. Co. v. United States*, 127 C. C. A. 438, 211 Fed. 12; *Central Vermont R. Co. v. United States*, 123 C. C. A. 308, 205 Fed. 40; *Nichols v. Chesapeake & O. R. Co.*, 115 C. C. A. 601, 195 Fed. 913; *Norfolk & W. R. Co. v. Hazelrigg*, 107 C. C. A. 66, 184 Fed. 828; *United States v. Southern Pac. Co.*, 167 Fed. 699; *United States v. Denver & R. G. R. Co.*, 90 C. C. A. 329, 163 Fed. 519; *Donegan v. Baltimore & N. Y. R. Co.*, 91 C. C. A. 555, 165 Fed. 869; *United States v. Central of Georgia Ry. Co.*, 157 Fed. 893; *United States v. Chicago, M. & St. P. Ry. Co.*, 149 Fed. 486.

In *Central Vermont Ry. Co. v. United States*, *supra*, the court said: "Uncoupling levers on the adjoining ends of two cars, it appeared, are customarily located upon opposite sides, and to get from the operating end of one of these levers to the operating end of the other it is necessary to go over, under, or around the train. And there was uncontradicted evidence for the defendant that it would be an easier method of uncoupling to do this than to go

between the cars and raise the lockpin of the defective coupler by hand. The District Court refused to rule that upon the evidence the plaintiff could not recover the penalties demanded under the act, or to rule that in order to recover them the plaintiff must prove it impossible to uncouple each car in question from the car to which it was coupled without the necessity of a man's going between the two cars, or to rule that if it was possible so to uncouple the two cars the act was not violated, even though one of the two coupled cars did not have an uncoupling lever in working order. The court charged the jury, in substance, that if they believed the testimony of the plaintiff's witnesses they should find in its favor. The jury having found for the plaintiff, the defendant has excepted to the above rulings and refusals. We think the refusals and rulings were right. What the act forbids is the hauling of 'any car' not equipped as the act requires. Each car, under the act, must have couplers which can be uncoupled without

**§ 822. Automatic Couplers Not Required Between Engine and Tender.** While the 1903 amendment specifically requires automatic couplers on all locomotives, tenders, cars and similar vehicles on all railroads engaged in interstate commerce, neither this amendment nor Section 2 of the original act requires automatic couplers between the engine and the tender because a locomotive, composed of an engine and tender, is a single thing and the tender and engine part are never separated in their ordinary and essential use. The law does not destroy the integrity of the locomotive and tender and the statute is entirely observed by having an automatic coupler at the rear end of the tender.<sup>35</sup> Thus where a fireman while on duty fell from the engine when the coupling—drawbar and pin—between the engine and the tender broke, causing the two parts to separate, it was urged by the administrator, in the case cited, that the Safety Appliance Act required an automatic coupler between the tender and the engine. Both the Federal Circuit Court of Appeals and the United States Supreme Court on writ of error, held that the statute did not apply to such a connection.

**§ 823. Actual Use of Coupler not Necessary to Constitute Offense.** If a coupler is in fact defective within the meaning of the statute and the car is used on a highway of interstate commerce, actual use of the coupler itself, that is, proof that the car was coupled to another, necessitating the entrance of an employe between the two cars, is not a necessary element of the offense created by the statute.<sup>36</sup>

**§ 824. Failure of Pin Lifter to Open Knuckles.** If the condition of a coupler is such that the knuckles

requiring men to go between the cars. If these requirements are not complied with in the case of a given car, the noncompliance cannot be excused by saying that some other car coupled to it at the time had couplers which did

answer the requirements of the car."

35. Pennell v. Philadelphia & R. R. Co., 231 U. S. 675, 58 L. Ed. 430, 34 Sup. Ct. 220.

36. United States v. Denver & R. G. R. Co., 90 C. C. A. 329, 163 Fed. 519.

cannot be opened with the use of the pin lifter and that either of them must be opened with the use of the hand, the coupler is defective within the meaning of the statute as it will not couple automatically by impact.<sup>37</sup>

**§ 825. Illustrative Cases in which Violations of Coupler Provision Held to be Proximate Cause of Injuries.** Where a brakeman, in attempting to cut off two cars from a train while it was moving slowly, was forced to step in between two cars to uncouple them because of a broken coupler, and while attempting to pull the pin by hand, his foot was caught in an unblocked switch, the court held that it was a question for the jury to determine whether the defective coupler was the proximate cause of the injury.<sup>38</sup> In another case, a switchman stepped to the end of a car to repair a defective coupler. While adjusting the coupler, three other cars standing about five or six feet from him, without any apparent cause, silently moved and caught and crushed him. It was held that the question whether the defective coupler was a proximate cause of the injury was properly submitted to the jury.<sup>39</sup>

**§ 826. Forms of Instructions for Violation of Coupler Provision in Personal Injury Cases.** A charge of a trial court to a jury telling them that they could not find for the plaintiff unless, by a preponderance of the evidence, they were satisfied that at the time of the injury the cars which he was assisting in coupling had either never been equipped with couplers coupling automatically by impact, or that the couplers on said cars had become so broken, out of repair, defective, or insufficient that they would not couple automatically by impact, and that the injury was directly caused either by the failure to so equip the cars or by the fact that

37. *Burho v. Minneapolis & St. L. R. Co.*, 121 Minn. 326, 141 N. W. 300; *Hurley v. Illinois Cent. R. Co.*, 133 Minn. 101, 157 N. W. 1005.

38. *Donegan v. Baltimore & N. Y. Ry. Co.*, 91 C. C. A. 555, 165 Fed. 869.

39. *Erie R. Co. v. Russell*, 106 C. C. A. 160, 183 Fed. 722.

the couplers on the cars had become so broken, out of repair, or insufficient that they would not couple automatically by impact, correctly defined the right of the plaintiff and the correlative liability of the defendant.<sup>40</sup>

**§ 827. Model Couplers May Be Exhibited to the Jury.** The exhibition of model couplers for the purpose of aiding the court and jury in acquiring a clear and distinct idea of automatic couplers and defects therein, is permissible.<sup>41</sup>

40. Wheeling Terminal R. Co. v. Russell, 126 C. C. A. 519, 209 Fed. 795.

41. Norfolk & W. R. Co. v. United States, 112 C. C. A. 46, 191 Fed. 302.

## CHAPTER XLV.

### DUTIES OF CARRIERS AS TO GRAB IRONS, SILL STEPS, RUNNING BOARDS AND HAND BRAKES.

- Sec. 828. Requirement of Original Act Limited to Handholds for Coupling and Uncoupling Purposes Only.
- Sec. 829. Grab Iron Provision Enlarged by Amendment of 1903 to Include Intrastate Cars.
- Sec. 830. Sill Steps, Hand Brakes, Ladders, Running Boards and Certain Grab Irons.
- Sec. 831. Employees Using Grab Irons for Other Purposes Than Coupling Cars, Within Protection of Statute.
- Sec. 832. No Distinction between Foreign and Domestic Cars.
- Sec. 833. Substitutes Affording Equal Security with Grab Iron or Handhold Unlawful.
- Sec. 834. Duty to Furnish Sill Steps, Running Boards, Hand Brakes and Handholds Absolute and Mandatory.
- Sec. 835. Duties of Carriers Include Maintenance as well as Equipment of Cars with Statutory Appliances.
- Sec. 836. Patton v. Illinois C. R. Co. and Like Cases Overruled.
- Sec. 837. Extent of the Requirements of Section 2 of the 1910 Amendment.
- Sec. 838. Illustrative Violation of Failure to Maintain Secure Running Board.
- Sec. 839. Erroneous Views as to Non-Applicability of Hand Brake Provision to Switching Operations.
- Sec. 840. Requirements of Section 2 of 1910 Amendment not Affected by Order of Interstate Commerce Commission under Section 3.
- Sec. 841. Purpose of Congress in Empowering Commission to Prescribe Standardized Equipment on all Cars.

**§ 828. Requirement of Original Act Limited to Handholds for Coupling and Uncoupling Purposes Only.** The original Safety Appliance Act of 1893 only required handholds or grabirons in the ends and sides of each car.<sup>1</sup> The act was further limited in its application to

1. United States v. Baltimore & O. R. Co., 184 Fed. 94; United States v. Boston & M. R. Co., 168 Fed. 148; United States v. Chicago & N. W. Ry. Co., 157 Fed. 616; Southern R. Co. v. Railroad

Commission of Indiana, 179 Ind. 23, 100 N. E. 337.

McDowell, J., in United States v. Baltimore & O. R. Co., *supra*: "As it is not possible to properly assert that in enacting section 4

such handholds solely for the greater security of men in coupling and uncoupling cars.<sup>2</sup> These were the sole requirements prior to the 1910 amendment as to handholds. In the original act there were no requirements as to ladders or handholds for brakeman to ascend and descend from the tops of cars, nor were there any provisions as to sill steps, hand brakes, running boards and grabirons on roofs of cars.

**§ 829. Grab Iron Provision Enlarged by Amendment of 1903 to Include Intrastate Cars.** The requirement as to grab irons in the ends and sides of each car for the greater security of men in coupling and uncoupling cars, was limited in the original act to cars used in interstate commerce; but by the amendment of 1903, this handhold or grab iron provision was extended to all locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce, and to all other loco-

Congress was requiring the performance of an act which all men will agree would be entirely useless, it must be admitted that Congress may itself have passed judgment on the utility of handholds, in addition to other appliances, in both the ends and sides of all cars. If so, it is certain that neither judges nor juries have any power to review the judgment of Congress; and, if so, it would have been submitting to the jury the wisdom or want of it displayed by Congress to have submitted the case at bar to the jury. \* \* \* As I construe the statute, it indicates that Congress has itself passed judgment on the utility of handholds in the ends and sides of cars, and it must be read as an absolute requirement. In a case, therefore, where it is admitted that there were no handholds in the sides

of the cars, I am unable to perceive that there was any question of fact to be left to the jury."

2. Dawson v. Chicago, R. I. & P. R. Co., 52 C. C. A. 286, 114 Fed. 870; Daly v. Illinois Cent. R. Co., 170 Ill. App. 185.

Judge Dodge, in *United States v. Boston & M. R. Co.*, 168 Fed. 148, said: "Now, taking that section as it stands, and giving due weight to the language in which the requirements are expressed, we have to consider just what they mean as applied to the question arising in this case, and I shall instruct you, gentlemen, that section 4 requires secure grabirons or handholds at those points in the end of each car where they are reasonably necessary in order to afford to men coupling or uncoupling cars greater security than would be afforded them in the absence of any grab iron or handhold at that point



motives, cars and similar vehicles used in connection therewith.<sup>3</sup>

**§ 830. Sill Steps, Hand Brakes, Ladders, Running Boards and Certain Grab Irons.** Under the provisions of Section 2 of the 1910 amendment, all cars used on any interstate railroad must be equipped with secure sill steps and efficient hand brakes, but in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars, while they are thus combined for such purpose. The amendatory act of 1910, further required all common carriers subject to the act to provide all cars requiring secure ladders and secure running boards, to be equipped with such ladders and such running boards, and also required all cars having ladders, to be equipped with secure handholds or grab irons on the roofs at the tops of such ladders.<sup>4</sup>

or of any appliance affording equal security with a grab iron or handhold."

3. "The rule of the law to be deduced from the plain reading of the statute as amended by the act of 1903, applicable to the case before us, may, I think, be succinctly stated to be that it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for greater safety to men in coupling and uncoupling cars, and by the amendment of 1903 the prohibition of such use is extended to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and to all other locomotives, cars, and similar vehicles used in connection therewith. Under the statement of the rule

declared by the statute, it would follow that if a car containing an interstate shipment was locally hauled, as in this case, with other cars containing local freight only, and such local trip constituted any part, however, short, of the interstate trip, and a car containing local freight only, out of repair as to grabirons, should be used in connection with the car containing the interstate shipment, the railroad so using the local car in connection with the interstate car would be guilty of a violation of the statute, and subject to its penalty."—United States v. Illinois Cent. R. Co., 166 Fed. 997.

4. Illinois Cent. R. Co. v. Williams 242 U. S. 462, 61 L. Ed. 437, 37 Sup. Ct. 128; Coleman v. Illinois Cent. R. Co., 132 Minn. 22, 155 N. W. 763; Missouri, K. & T. Ry. Co. of Texas v. Barrington, — Tex. Civ. App. —, 173 S.

§ 831. **Employees Using Grab Irons for Other Purposes Than Coupling Cars, Within Protection of Statute.** The provision of Section 2 of the 1910 amendment<sup>5</sup> which prescribes that all cars requiring ladders shall be equipped with secure ladders, grabirons and handholds is not qualified by the phrase "for the greater security of men in coupling and uncoupling cars." In this it differs from the original act which required secure grabirons for such purpose. Hence, since the 1910 amendment, employees using the handholds and ladders for any purpose within the scope of their duties other than coupling or uncoupling cars, are within the protection of statute as amended. Illustrating this principle, a brakeman while descending from the top of a car after setting the brake during a switching movement in a terminal yard, fell because of a defect in one of the handholds that formed the rungs of a ladder. Under these facts, the court held that he was within the protection of the act even though he was neither coupling nor uncoupling cars.<sup>6</sup> The court said: "It is insisted that Rigsby was not within the protection of the act because he was not coupling or uncoupling cars at the time he was injured. The reference is to sec. 4 of the act of March 2, 1893, which requires 'secure grab irons or hand holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.' This action was not based upon that provision, however, but upon sec. 2 of the amendment of 1910, which declares: 'All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders.' There can be no question that a box car having a hand brake operated

W. 595; Calhoun v. Great Northern R. Co., 162 Wis. 264, 156 N. W. 198.

5. 36 Stat. at L. 298, appendix G. *infra*.

6. Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 60 L. Ed. 874, 36 Sup. Ct. 482, affirming 138 C. C. A. 51, 222 Fed. 221.

from the roof requires also a secure ladder to enable the employee to safely ascend and descend, and that the provision quoted was intended for the especial protection of employees engaged in duties such as that which plaintiff was performing."

**§ 832. No Distinction between Foreign and Domestic Cars.** The statute makes no distinction between foreign and domestic cars as to the requirements concerning grab irons, handholds, hand brakes, running boards and sill steps. "The evidence doubtless showed that the car from which appellee fell was not owned by appellant, but belonged to another railway company, therefore a 'foreign car,' but that fact, under the law as it exists now and as it existed at the time appellee was injured, did not relieve appellant of the duty of maintaining the handhold upon said car which gave way and caused appellee to fall, in a safe and secure condition."<sup>8</sup>

**§ 833. Substitutes Affording Equal Security with Grab Iron or Handhold Unlawful.** Although the original act prescribed that it was unlawful for any railroad company to use any car in interstate commerce that was not provided with secure grab irons or handholds in the ends and sides of each car for the greater security to men in coupling and uncoupling cars, the court in *United States v. Boston & M. R. Co.*,<sup>9</sup> an action for a penalty, charged the jury that if the car in question was supplied with some other appliance, such as a ladder or brake level which afforded equal security with a grab iron or a handhold at that point, then the law had not been violated so far as the grab iron or handhold was concerned. In that case the court adopted the view

7. *Missouri, K. & T. Ry. Co. v. Texas v. Barrington*, — Tex. Civ. App. —, 173 S. W. 595, in which the court said: "Nor does the fact that the car in question was a 'foreign car' alter the case. The Safety Appliance Acts, as we understand, apply

to any car in use by the carrier."

8. *Missouri, O. & G. Ry. Co., v. Plemmons*, — Tex. Civ. App. —, 11 N. C. C. A. 1056, 171 S. W. 259.

9. 168 Fed. 148, decided Jan. 5, 1909.

that if the carrier supplied something which performed all the functions of a grab iron or a handhold, it was the same thing as having what is properly called a grab iron or a handhold at that point. But the rule of law applied in this case has been emphatically rejected by the United States Supreme Court.<sup>10</sup> It is not permissible to allow the provisions of the Safety Appliance Act to be satisfied by equivalents or by anything else than literal compliance with what the statute prescribes.

**§ 834. Duty to Furnish Sill Steps, Running Boards, Hand Brakes and Handholds Absolute and Mandatory.** The duty imposed by Section 2 of the 1910 amendment requiring secure sill steps on all cars, and efficient hand brakes, ladders, running boards and handholds on roofs of certain cars is absolute and mandatory,<sup>11</sup> and ignorance or a failure to discover the defects by inspection or by the exercise of any care, is no defense in either a penal or personal injury action. The same duty exists as to the appliances required in the 1910 amendment that was held to be imposed by the provisions of the original act.<sup>12</sup>

**§ 835. Duties of Carriers Include Maintenance as well as Equipment of Cars with Statutory Appliances.** It follows therefore from the principles enforced in the cases cited in the foregoing paragraph that the duties

10. *St. Joseph & G. I. R. Co. v. Moore*, 243 U. S. 311, 61 L. Ed. 741, 37 Sup. Ct. 278.

11. *United States Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. Ed. 874, 36 Sup. Ct. 482.

*Minnesota. McNaney v. Chicago, R. I. & P. R. Co.*, 132 Minn. 391, 157 N. W. 650; *Coleman v. Illinois Cent. R. Co.*, 132 Minn. 22, 155 N. W. 763.

*New Mexico. Thayer v. Denver & R. G. R. Co.*, 21 N. Mex. 330, 154 Pac. 691.

*Texas. Missouri, K. & T. Ry.*

*Co. of Texas v. Barrington*, — Tex. Civ. App. —, 173 S. W. 595.

*Wisconsin. Calhoun v. Great Northern R. Co.*, 162 Wis. 264, 156 N. W. 198.

12. *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 559, 55 L. Ed. 582, 31 Sup. Ct. 612; *Delk v. St. Louis & S. F. R. Co.*, 220 U. S. 580, 55 L. Ed. 590, 31 Sup. Ct. 617; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. Ed. 1061, 28 Sup. Ct. 616.

of carriers under the Safety Appliance Act extend not only to the original equipment of cars with the safety appliances, but also to their maintenance in a secure condition. In *Armitage v. Chicago, M. & St. P. Ry. Co.*,<sup>13</sup> a judgment in favor of a brakeman who was injured in undertaking to set a hand brake on a car because of a failure to maintain an "efficient hand brake" in violation of the 1910 amendment, was affirmed. Discussing the requirements of the statute as amended, the court said: "This action was brought under the federal Employers' Liability Act of April 22, 1908 (35 Stat. at Large, 65, c. 149), and the Safety Appliance Acts of March 2, 1893 (27 Stat. at Large, 531, c. 196), and April 14, 1910 (36 Stat. at Large, 298, c. 160). The last-mentioned act requires that all cars subject to the provisions of the act must be equipped with 'efficient hand brakes.' It is settled beyond controversy that these Safety Appliance Acts impose upon the carrier an absolute duty (1) to equip its cars with the prescribed appliances, and (2) to maintain such appliances in a secure condition. *St. Louis, I. M. & S. Ry. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 106; *Chicago, B. & Q. Ry. Co. v. United States*, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582; *Delk v. St. Louis & San Francisco R. R. Co.*, 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590; *Texas & Pac. Ry. Co. v. Rigsby*, 241 U. S. 33, 36 Sup. Ct. 482, 60 L. Ed. 874. Under instructions of the court, the jury, in response to special interrogatories, found in effect that the reach rod and chain met the requirements of the federal acts and the regulations of the Interstate Commerce Commission, if the chain had been hooked over the end of the rod as intended; and it is now the contention of appellant that it did not violate the law, even though some one wrongfully connected the chain and rod by means of the baling wire, which would not withstand the force necessary to set the brakes. Counsel for appellant epitomize this contention as follows: 'All that is required is that the brake rod and chain be constructed according to the design and requirements of the Interstate Commerce

13. — Mont. —, 166 Pac. 301.

Commission, so they can be hooked together in the usual manner for the proper operation of the appliance.

. . . The perfect braking appliance did not become inefficient or unsafe because some one went to the trouble of wiring the link on the end of the brake chain to the hook on the end of the brake rod.' While no one of the cases cited above involved a state of facts similar to the facts of the case before us, yet, as we understand the construction placed upon the Safety Appliance Acts by those cases, the principle involved in each of them is the same as that presented in this instance. Certainly it could not be contended that if car No. 61981 had been turned out of the shops with the hand brake appliances loaded on the car, there would have been a compliance with section 2 of the act of 1910, even though each component part was in perfect condition. Neither, in our opinion, would the requirements of the act have been met if the defendant in the first instance, in adjusting these appliances to the car, had deliberately fastened the chain to the rod by means of an old rusty wire, which would not withstand the strain necessary to set the brakes. The act clearly requires that the carrier shall not only furnish the necessary parts of the braking apparatus, but it shall furnish them so properly adjusted and connected that the brake will be efficient in the condition in which the car is turned over to the employe. To make a more concrete application: The absolute duty was imposed upon defendant to furnish this car with the several parts of the hand-braking appliances so securely connected that the brakes could be set with safety in the ordinary routine of a brakeman's duties. If it was necessary to that result that the chain be hooked over the end of the rod, then the duty was imposed upon the carrier to see that such connection was made in the first instance. As we understand the decisions in the cases above cited, the same high standard of duty is imposed upon the carrier to maintain the appliances in a secure condition as is imposed upon it to furnish the equipment in the first instance; and if this be correct—and we think it is—then there was imposed upon this defendant an absolute

duty to see that the chain and rod were connected securely at times, and its failure to do so constitutes a breach of its statutory duty."

§ 836. **Patton v. Illinois C. R. Co. and Like Cases Overruled.** It results also from the doctrine adopted in the decisions cited that the rule enforced in *Patton v. Illinois C. R. Co.*<sup>14</sup> and other like cases, holding that the plaintiff must prove that the defendant had either actual or constructive knowledge of defects in ladders, hand brakes and running boards, is no longer applicable in personal injury actions for violations of the Safety Appliance Act.<sup>15</sup> "The Safety Appliance Act referred to above provides that it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grabirons or handholds, and declares that any employe injured on any car in use, contrary to the provisions of the act, shall not be deemed to have assumed the risk, although he had full knowledge thereof. In construing this statute, the Supreme Court of the United States, the Court of Civil Appeals for the Fourth District of Texas, and this court held that it makes it the absolute duty of railway companies to have the cars in use by them equipped with secure handholds, regardless of the question of reasonable care to have and keep them secure, and that, where an injury to an employe happens from an insecure handhold, said statute denied to the employer the defense of assumed risk. . . . Furthermore, we find that at the time appellee was hurt he was climbing up to the top of the car on a ladder, and that by act of Congress, passed April 14, 1910, to supplement an act to promote the safety of employes, etc., it is provided, among other things, that: 'All cars having ladders shall also be equipped with secure handholds or grabirons on their roofs at the top of such ladders.' "<sup>16</sup>

14. 179 Fed. 530.

15. *Missouri, O. & G. Ry. Co. v. Plemmons*, — Tex. Civ. App. —, 8 N. C. C. A. 265, 171 S. W. 259; *Galveston, H. & S. A.*

*Ry. Co. v. Kurtz*, — Tex. Civ. App. —, 147 S. W. 658.

16. *Missouri, K. & T. Ry. Co. of Texas v. Barrington*, — Tex. Civ. Appeal, —, 173 S. W. 595.

**§ 837. Extent of the Requirements of Section 2 of the 1910 Amendment.** The Supreme Court of Minnesota in construing Section 2 of the 1910 amendment in connection with the original act, held that every handhold, sill step, ladder and running board designed for the use of employes in their necessary work of operating trains, must be secure, and that every such handhold, sill step, ladder and running board is included within the provisions of Section 2.<sup>17</sup>

**§ 838. Illustrative Violation of Failure to Maintain Secure Running Board.** The 1910 amendment requires "secure running boards" on all cars requiring running boards. In one of the first personal injury cases reported, for a violation of this provision of the statute,<sup>18</sup> the court held that a running board on a box car consisting of three boards placed together, the end of one of which was from one-fourth to five-eighths of an inch higher than the end of the adjacent board where the two boards met about the middle of the car, was a defect within the meaning of the statute.

**§ 839. Erroneous Views as to Non-Applicability of Hand Brake Provision to Switching Operations.** With the exception of the requirements as to air brakes under Section 1 of the original Act and Section 2 of the 1903 amendment and the order of the Interstate Commerce Commission made pursuant thereto, all of the provisions of the Safety Appliance Acts apply to switching operations as well as to main line movements. The provision of Section 2 of the 1910 amendment requiring efficient hand brakes also applies to switching movements. The decision of the Supreme Court of New Jersey to the contrary is plainly erroneous.<sup>19</sup> In that case a brakeman was injured while attempting to con-

17. *McNaney v. Chicago, R. I. & P. Ry. Co.*, 132 Minn. 391, 157 N. W. 650, in which the court held that the 1910 amendment applies to grabirons at the end of a caboose.

18. *Calhoun v. Great Northern R. Co.*, 162 Wis. 264, 156 N. W. 198.

19. *Farrell v. Pennsylvania R. Co.*, 87 N. J. L. 78, 93 Atl. 682.



trol the movement of three cars in a switching yard with a hand brake. The hand brake proved inefficient for the work and the plaintiff was forced to jump to avoid injury. In denying a recovery, the court held that the Safety Appliance Act did not apply to switching operations, but this was plain error as the hand brake provision applies although the air brake provision does not apply. In fact, the use of hand brakes on main lines is prohibited.<sup>20</sup> Their use, therefore, is confined strictly to switching operations and proof of an inefficient hand brake in switching operations constitutes a violation of the statute.

**§ 840. Requirements of Section 2 of 1910 Amendment not Affected by Order of Interstate Commerce Commission under Section 3.** The requirements of the section 2 of the 1910 amendment declaring it unlawful for any railroad company to use in its service after July 1, 1911, any car not equipped as therein provided, was not affected or suspended by reason of the power given to the Interstate Commerce Commission under Section 3 of the same amendment, to designate the number, dimensions, location and manner of application of the appliances provided in section 2 of the 1910 amendment and Section 4 of the original act.<sup>21</sup> Section 2 and Section 3 of the 1910 amendment relate to entirely different branches of the same subject and Section 3 was not intended as a qualification of the express provisions of Section 2. The fact that the Interstate Commerce Commission in its order under Section 3 provided that it should not go into effect until sometime in July, 1916 did not affect or suspend the provision of Section 2.<sup>22</sup> "So it seems clear," the court said in the case cited, "that the sole purpose of Section 3

20. *United States v. Great Northern R. Co.*, 144 C. C. A. 209, 229 Fed. 927; *Virginian R. Co. v. United States*, 139 C. C. A. 278, 223 Fed. 748.

21. *Illinois Cent. R. Co. v.*

*Williams*, 242 U. S. 462, 61 L. Ed. 437, 37 Sup. Ct. 128.

22. *Cook v. Union Pac. R. Co.*, — *Iowa* —, 158 N. W. 521; *Coleman v. Illinois Cent. R. Co.*, 132 Minn. 22, 155 N. W. 763.

was to authorize the Commission to prescribe a uniform standard for the equipment of the cars of all the interstate railroads, and to require conformity therewith by such roads. The commission was by the terms of the statute required to formulate rules fixing such standard within the time stated therein, and its order in the premises was given the force and effect of law. Congress had in mind that it would, as to some of the roads, be a practical impossibility to at once meet the demands of the new standard, and the Commission was further authorized to extend to them such time as would afford full opportunity of compliance. But in so providing it clearly was not the intention that during the period taken for installing the standard equipment defective cars might be used and employed in the train service; nor was it intended that during that period Section 2 of the act should remain inoperative. If such had been the intention, then that section might well have been omitted altogether, and Section 3 made the substantial and embodiment of the whole enactment, for then its privilege would have been limited and in harmony with the contention of defendant, namely, as an enactment requiring, within such time as the Interstate Commission might fix therefor, all railroads to equip and conform their cars to the standard there provided for. This view of the act cannot be adopted without doing violence to Section 2. Congress intended that section to be a part of the statute, and the clear language thereof cannot be rejected, or held inoperative pending the installation of the standard of equipment to be ordered by the commission without running counter to the main purpose of the act. The section must therefore stand, as a part of the statute, and be construed as imposing the duty upon railroads to maintain their car equipment in secure and safe condition for use after July 1, 1911. Section 3 must be construed as a requirement of a uniform standard for such equipment, and that the extension of time within which to conform thereto has no reference to, and does not relieve them, the duty to maintain present equipment in secure and safe condition."

§ 841. **Purpose of Congress in Empowering Commission to Prescribe Standardized Equipments on all Cars.** The purpose of Congress in authorizing the Interstate Commerce Commission to designate the number, dimensions, location and manner of application of handholds, sill steps, hand brakes, ladders and running boards was to better protect railroad employes and travelers by having a uniform method of standard of car equipment applicable to all interstate roads. Congress recognized that cars of different roads are promiscuously handled, that frequently they are not equipped in the same manner and that a train composed of cars differently supplied with the appliances referred to in the statute result in confusion to the employes and increases the danger connected with their work. With uniformity of equipment this confusion is necessarily largely eliminated and the danger of injury lessened.<sup>23</sup>

23. *Illinois Cent. R. Co. v. Williams*, 242 U. S. 462, 61 L. Ed. 437, 37 Sup. Ct. 128; *Coleman v. Illinois Cent. R. Co.*, 132 Minn. 22, 155 N. W. 763.

## CHAPTER XLVI.

### STATUTORY REQUIREMENTS AS TO DRAWBARS.

- Sec. 842. Standard Height of drawbars Required After December 31, 1910.
- Sec. 843. Distinction Between New and Old Orders as to Height of Drawbars.
- Sec. 844. Ruling in St. Louis, I. M. & S. Ry. Co. v. Taylor, Modified by New Order.
- Sec. 845. Instruction Erroneous under Both Old and New Orders.
- Sec. 846. Instructions Erroneous Under Old Order But Correct Under the New Order.
- Sec. 847. Drawbar Provision Applicable to Engines as well as Cars.
- Sec. 848. Duty as to Height of Drawbars Cannot be Delegated or Evaded by Casting it Upon Others.

**§ 842. Standard Height of Drawbars Required After December 31, 1910.** Under the provisions of Section 3 of the 1910 amendment of the Safety Appliance Act, the Interstate Commerce Commission was given authority, after hearing, to modify or change and to prescribe the standard height of drawbars, and to fix the time within which such modification or change shall become effective. Pursuant to this statutory authority, an order was entered on October 10, 1910, to take effect on December 31, 1910, fixing the standard height of drawbars on standard-gauge, narrow-gauge and two-foot-gauge railroads engaged in interstate commerce, which was as follows: "Order of October 10, 1910. In re Standard Height of Drawbars. Whereas, by the third section of an Act of Congress approved April 14, 1910, entitled 'An Act to supplement 'An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes and for other purposes,' and other safety appliance Acts, and for other purposes,' it is provided, among other things, that the Interstate Commerce Commission is hereby given authority, after hearing, to modify or change and to prescribe the

(1376)

standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory; and Whereas, a hearing on the matter of any modification or change in the standard height of drawbars was held before the Interstate Commerce Commission at its office in Washington, D. C., on June 7, 1910: Now, therefore, in pursuance of and in accordance with the provisions of said section 3 of said Act, It is ordered That (except on cars specified in the proviso in section 6 of the Safety Appliance Act of March 2, 1893, as the same was amended April 1, 1896), the standard height of drawbars heretofore designated in compliance with law is hereby modified and changed in the manner hereinafter prescribed, to wit: The maximum height of drawbars for freight cars measured perpendicularly from the level of the tops of rails to the centers of drawbars for standard-gauge railroads in the United States subject to said Act shall be 34 1-2 inches, and the minimum height of drawbars for freight cars on such standard-gauge railroads measured in the same manner shall be 31 1-2 inches, and on narrow-gauge railroads in the United States subject to said Act the maximum height of drawbars for freight cars measured from the level of the tops of rails to the centers of drawbars shall be 26 inches, and the minimum height of drawbars for freight cars on such narrow-gauge railroads measured in the same manner shall be 23 inches, and on 2-foot-gauge railroads in the United States subject to said Act the maximum height of drawbars for freight cars measured from the level of the tops of rails to the centers of drawbars shall be 17 1-2 inches, and the minimum height of drawbars for freight cars on such 2-foot-gauge railroads measured in the same manner shall be 14 1-2 inches. *And it is further ordered*, That such modification or change shall become effective and obligatory December 31, 1910."

**§ 843. Distinction Between New and Old Orders as to Height of Drawbars.** The first order of the Interstate Commerce Commission promulgated by that body pursuant to the resolution of the American Railway Associa-

tion, under Section 5 of the original act, went into effect on July 1, 1895, and remained in effect without change until December 31, 1910 when it was supplanted by the new order adopted by the Interstate Commerce Commission on June 6, 1910 under Section 3 of the 1910 amendment. The old order fixed the standard height of the drawbars of cars on standard-gauge railroads at 34 1-2 inches measured perpendicularly from the level of the tops of the rails to the center of the drawbar with a maximum variation of 3 inches to be allowed between empty and loaded cars, that is, the absolute standard for empty cars being 34 1-2 inches and a permission was given for a lower height not exceeding 3 inches for cars partly loaded or full. In the same way the same variation in the standard was fixed as to cars on narrow-gauge railroads, the standard being 26 inches for empty cars. But in the new order now in effect, no distinction is made between empty and loaded cars. A maximum and minimum height was fixed for all cars, empty and loaded, the height not to exceed 34 1-2 inches, and not lower than 31 1-2 inches. Under the old order an empty car with a drawbar lower than 34 1-2 inches or varying to any extent therefrom, constituted a defect within the meaning of the act, but under the new order the height of even empty cars may vary from 34 1-2 to 31 1-2 inches. This is the substantial distinction between the two orders except that the new order, however, fixes the height of drawbars on 2-foot-gauge railroads which was not done in the old order, the maximum being 17 1-2 inches and the minimum being 14 1-2 inches.

**§ 844. Ruling in St. Louis, I. M. & S. Ry. Co. v. Taylor, Modified by New Order.** The ruling of the United States Supreme Court in *St. Louis, I. M. & S. R. Co. v. Taylor*,<sup>1</sup> a leading case on the drawbar provision of the Safety Appliance Act, is still frequently cited by some courts and careless commentators, as properly declaring the law concerning the drawbar requirements. But the United States Supreme Court in the *Taylor* case

1. 210 U. S. 281, 52 L. Ed. 1061, 28 Sup. Ct. 616.

was construing the law as to the drawbar requirements as declared in the old order of the Commission, and the ruling therein does not properly declare the law under the new order, for unloaded freight cars are not required to be of the uniform standard height of 34 1-2 inches. That height is now merely the maximum, and the minimum is now 31 1-2 inches. In the Taylor case, the court, no doubt, properly construed the law as declared in the old order of the Commission, but it is a wholly erroneous view to suppose that the same rules apply in construing the new order.

**§ 845. Instruction Erroneous under Both Old and New Orders.** An instruction which charged the jury that "the Act of Congress fixed the standard height of loaded cars engaged in interstate commerce on standard-gauge railroads at 31 1-2 inches, and unloaded cars at 34 1-2 inches, measured perpendicularly from the level of the face of the rails to the center of the drawbars and this variation of 3 inches in height is intended to allow for the difference in height caused by loading the car to the full capacity, or by loading it partially or by its being carried in the train when it is empty. Now, the law required that the two cars between which Taylor lost his life, should be when unloaded, of the equal and uniform height, from the level of the face of the rails to the center of the drawbars, of 34 1-2 inches and, when loaded to the full capacity, should be of the uniform height of 31 1-2 inches" was properly held to be erroneous under the old order for the reason that under it a variation of 3 inches was allowed as to cars loaded or partly loaded, though the statement that empty cars were required to be of the standard of height of 34 1-2 inches was correct under the old order. Such an instruction would also be erroneous under the new order of the Commission now in effect for the reason that a variation of 3 inches between 34 1-2 and 31 1-2 inches is allowed on all cars whether loaded or empty.

**§ 846. Instructions Erroneous Under Old Order but Correct Under the New Order.** The United States

Supreme Court held, in the Taylor case, while the old order was still in effect, the following instructions to be erroneous: "The court charges you that the act of Congress allows a variation in height of 3 inches between the centers of the drawbars of all cars used in interstate commerce, regardless of whether they are loaded or empty, the measurement of such height to be made perpendicularly from the top of the rail to the center of the drawbar, shank or draft of line." Unquestionably this instruction was erroneous under the old order of the Commission but as a variation of 3 inches, that is, a maximum of 34 1-2 inches and a minimum of 31 1-2 inches, is now permitted for empty cars as well as loaded cars, such an instruction would clearly not be erroneous under the new order now in effect.

**§ 847. Drawbar Provision Applicable to Engines as well as Cars.** Section 5 of the original act of 1893 limited the requirement as to drawbars of a certain height to "freight cars." Whether locomotive engines, as the statute thus stood, were included within the term "freight cars" may have been doubtful, but by the amendment of 1903 extending the provision of the original act to all cars, locomotives and similar vehicles on railroads engaged in interstate commerce, the drawbar provision unquestionably applies to engines as well as freight cars.<sup>2</sup> That the drawbar requirement should apply to engines is manifest, for the height of the drawbar determines the height of the coupler of an engine and the one has an intimate relation to the safety and security of the other. The gripping surface of the coupler used, measures seven to nine inches vertically and a low drawbar on an engine reduces the effectiveness of the coupler. Reviewing the history of the amendments to the Safety Appliance Act in deciding that the drawbar provision applied to engines, Mr.

2. Southern R. Co. v. Crockett, 234 U. S. 725, 58 L. Ed. 1564, 34 Sup. Ct. 897; Chicago, M. & P.

S. R. Co. v. United States, 116 C. A. 444, 196 Fed. 882.



Justice Pitney, for the court in the Crockett case, said: "The experience of the Interstate Commerce Commission, in seeing to the enforcement of the act of 1893, tended to emphasize the importance of interchangeable equipment upon the rolling stock of railroads engaged in interstate commerce, so that cars used in such commerce would readily couple with cars not so used, and that locomotives could be readily coupled with cars of either sort. The 16th Annual Report of the Commission, 1902, pp. 60, 61, recommended to Congress *inter alia*: 'That provisions relating to automatic couplers, grabirons, and the height of drawbars, be made to apply to all locomotives, tenders, cars, and similar vehicles, both those equipped in interstate commerce and those used in connection therewith (except those trains, cars, and locomotives exempted by the acts of March 2, 1893, and April 1, 1896).' This recommendation appears to have been evoked by the decision of the Circuit Court of Appeals in *Johnson v. Southern Pacific Co.*, 117 Fed. Rep. 462, afterwards reversed by this court in 196, U. S. 1. The Court of Appeals held that there was nothing in the act of 1893 to require a common carrier engaged in interstate commerce to have every car on its railroad equipped with the same kind of coupling, or to require that every car should be equipped with a coupler that would couple automatically with every other coupler with which it might be brought into contact; and also that the act did not forbid the use of an engine not equipped with automatic couplers, Congress not only responded to the recommendation of the Commission, but enlarged the act more broadly by enacting (Amendment of March 2, 1903, set forth in foot-note, *supra*) that the provisions and requirements of the original act should be held (a) to apply to common carriers by railroad in the Territories and the District of Columbia; (b) to apply in all cases whether or not the couplers brought together are of the same kind, make, or type; (c) that 'the provisions and requirements . . . relating to train brakes automatic couplers, grab irons, and the height of draw-bars shall be held to apply to all trains,

locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith,' excepting those exempted by the act of March 2, 1893, as amended April 1, 1896, and those used upon street railways. We have to do especially with the latter clause. As was intimated in *Southern Railway Co. v. United States*, 222 U. S. 20, 25, its collocation of phrases is not altogether artistic. But at least the purpose is plain that where one vehicle is used in connection with another, that portion of the equipment of each that has to do with the safety and security of the attachment between them shall conform to standard. We cannot assent to the argument that the clause means only that the locomotives used upon all railroads engaged in interstate commerce and in the Territories and the District of Columbia are to be equipped with the appliances provided by the original act for locomotives, and so on with the other classes of cars, and that hence the amendatory act has merely the effect of prescribing the standard height of draw-bars with respect to freight cars, because the original act required such a standard only with respect to cars of that type. This would give altogether too narrow a construction to the language employed by Congress, and would lose sight of the spirit and purpose of the legislation. We deem the true intent and meaning to be that the provisions and requirements respecting train brakes, automatic couplers, grab irons, and the height of drawbars shall be extended to all railroad vehicles used upon any railroad engaged in interstate commerce, and to all other vehicles used in connection with them, so far as the respective safety devices and standards are capable of being installed upon the respective vehicles. It follows that by the act of 1903 the standard height of draw-bars was made applicable to locomotive engines as well as to freight cars."

**§ 848. Duty as to Height of Drawbars Cannot be Delegated or Evaded by Casting it Upon Others.** The

duty to maintain drawbars at the height required by the order of the Interstate Commerce Commission, cannot be evaded by delegating that duty to others. Thus, evidence that the railroad company furnished the employes in charge of trains "shims" which are metallic wedges of different thickness to raise drawbars, and that a sufficient supply was carried in the caboose of the train, does not exonerate the railroad company from liability under the statute. The duty imposed by the statute cannot be evaded by shifting the burden of keeping the drawbars at the required height, upon the conductors and brakemen in charge of the trains.<sup>3</sup> In the Taylor case, cited, the railroad company requested the following instruction: "The court tells you that if you find from the evidence in this case the defendant equipped all its cars with uniform and standard height drawbars, when such cars are first built and turned out of the shops, then the defendant is only bound to use ordinary care to maintain such drawbars at the uniform and standard height spoken of in the testimony." In holding that this instruction and others of like import were properly refused, Mr. Justice Moody, for the court, said:<sup>4</sup> "We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there

3. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. Ed. 1061, 28 Sup. Ct. 616.

4. The instruction quoted in the text is not set out in the report of the Taylor case but is

found in Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 55 the history of the Taylor case is L. Ed. 582, 31 Sup. Ct. 612, where reviewed.

arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body. It is said that the liability under the statute, as thus construed, imposed so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation leading to hardship and injustice, if any other interpretation is reasonably possible. But this argument is a dangerous one, and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than break down the rules of law. But when applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employee and the public."

## CHAPTER XLVII.

### CARS AND MOVEMENTS EXCEPTED FROM REQUIREMENTS OF STATUTE.

- Sec. 849. The Statutory Provision.
- Sec. 850. "Necessary Movement" for Repairs Defined.
- Sec. 851. When Duty Arises to Repair Cars at Point of Discovery.
- Sec. 852. All Movements of Cars from Repair Points Prohibited.
- Sec. 853. Illustrative Movements in Violation of 1910 Proviso.
- Sec. 854. Burden upon Carrier to Bring Itself Within Proviso of Act of 1910.
- Sec. 855. Defective Cars may be Hauled to Repair Points in Revenue Trains or with Other Cars Commercially Used.
- Sec. 856. Exceptions to the Safety Appliance Act must be Strictly Construed.
- Sec. 857. Exempted Movements for Repair do not Affect Liability for Personal Injuries.
- Sec. 858. Cars on Interurban Railroads Moving Partly Over Street Railroad Tracks Not Exempted.
- Sec. 859. May Haul Defective Cars Containing Livestock or Perishable Freight with Chains.
- Sec. 860. Necessity of Movement for Repairs Generally a Question for the Jury.
- Sec. 861. Law as to Movement of Defective Cars Prior to 1910 Amendment.
- Sec. 862. Cars Exempted from Requirements of Act on Interstate Highways not Subject to State Laws.

§ 849. **The Statutory Provision.** Section 4 of the 1910 amendment to the original Safety Appliance Act prescribes: "That where any car shall have been properly equipped, as provided in this Act and the other Acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section four of this Act or section six of the Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, if such movement is necessary

(1385)

to make such repairs and such repairs can not be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this Act and the other Acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of draw-bars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or 'perishable' freight.'" It is further provided by Section 6 of the original Act and Section 1 of the amendment of 1903 that nothing in the Act shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such cars from the top of rail to the center of coupling does not exceed twenty-five inches, or to locomotives in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs, or cars which are used upon street railways.<sup>2</sup>

### § 850. "Necessary Movement" for Repairs Defined.

A car when first discovered to have a defect contrary

1. *Great Northern R. Co. v. Ottos*, 239 U. S. 349, 60 L. Ed. 322, 36 Sup. Ct. 124; *United States v. Erie R. Co.*, 237 U. S. 402, 59 L. Ed. 1019, 35 Sup. Ct. 621; *Pennsylvania Co. v. United States*, 154 C. C. A. 526, 241 Fed. 824; *Erie R. Co. v. United States*, 153 C. C. A. 64, 240 Fed. 28; *United States v. Pennsylvania Co.*, 237 Fed. 471; *United States v. Atchison, T. & S. F. Ry. Co.*, 220 Fed. 215; *United States Chesapeake & O. R. Co.*, 130 C. C. A. 262, 213 Fed. 748; *United States v. Trinity & B. V. R. Co.*, 128 C. C. A. 120, 211 Fed. 448; *Chicago, B. & Q. R. Co. v. United States*, 127 C. C. A. 438, 211 Fed. 12.
2. *International R. Co. v. United States*, 151 C. C. A. 333, 238 Fed. 317; *United States v. Northwestern Pac. R. Co.*, 235 Fed. 965.

to the statute may be hauled to the nearest available point for repairs if such movement "is necessary to make such repairs and such repairs cannot be made except at such repair point."<sup>3</sup> The term "necessary" as used in the statute, does not mean nor is it the equivalent of "convenient," "practicable," or "expedient." Nor, on the other hand, does the statute mean that if it was possible by the utmost endeavor to have repaired the car at the point of discovery by taking unlimited time and sending repair men and cars from the shop, the railroad company is subject to the penalty. If the movement was reasonably necessary in view of the practical operation of railroading to repair cars in the shop, then it is not a violation of the statute,<sup>4</sup> though one court has held that the word "necessary" in the statute should not be qualified by the word "practicably."<sup>5</sup>

3. Section 4 of the 1910 amendment, 36 Stat. at L. 298. Appendix G. *infra*.

4. *United States v. Chesapeake & O. R. Co.*, 130 C. C. A. 262, 213 Fed. 748; *United States v. Trinity & B. V. R. Co.*, 128 C. C. A. 120, 211 Fed. 448; *Chicago, B. & Q. R. Co. v. United States*, 127 C. C. A. 438, 211 Fed. 12; *Galveston, H. & S. A. R. Co. v. United States*, 118 C. C. A. 339, 199 Fed. 891.

5. *United States v. Atchison, T. & S. F. Ry. Co.*, 220 Fed. 215, wherein Bledsoe, J., said: "It is apparent to me from a careful reading of the Safety Appliance Act, together with its amendments, that Congress intended that an 'absolute' duty was to be cast upon common carriers operating the usual instrumentalities of interstate commerce; that such absolute duty required of such common carriers the doing of the certain precise definite things specified in the statute; that the

considerations impelling the requirement of these things were those looking to human safety and the protection of the lives of the thousands of employes engaged in and about the work incident to the carrying on of interstate commerce. Under such circumstances this court feels that considerations of 'convenience,' 'practicability,' or 'expediency' should not be permitted to fritter away or lessen the most commendable purpose of the act in question, and that a defendant should not be permitted to claim the benefit of the remedial amendment above referred to, unless such defendant clearly and indisputably brings itself within the purview thereof. If such be the correct and rational interpretation of the entire act, then in order that the movement of a car, such as is involved herein, can be justified, it must be shown by the carrier that such movement was neces-

**§ 851. When Duty Arises to Repair Cars at Point of Discovery.** When a car, properly equipped as provided in the statute, becomes defective or insecure while being used by the carrier on its line, it is the duty of the railroad company to remedy the defect and put the appliance in operative condition at the time and place of discovery if it has the means and appliances at hand to do so;<sup>6</sup> but this does not mean that the carrier must hold the train at the point of discovery until the defect is remedied. It has the right to move the train in its disabled condition to the

sary, in order that the required repairs might be made, and that such repairs could not be made except at the repair point to which the car was moved. It will not suffice, in my judgment, to hold that the word 'necessary' is the substantial equivalent of 'convenient,' or that it should be qualified by the phrases 'practicably,' or 'economically;' so to hold would be to place convenience, practicability, and economy above human life, and that this court will not do."

6. *United States v. Erie R. Co.*, 237 U. S. 402, 59 L. Ed. 1019, 35 Sup. Ct. 621; *United States v. Chesapeake & O. R. Co.*, 130 C. C. A. 262, 213 Fed. 748; *United States v. Atchison, T. & S. F. Ry. Co.*, 167 Fed. 696; *United States v. Chicago Great Western Ry. Co.*, 162 Fed. 775; *United States v. Southern Pac. Co.*, 154 Fed. 897.

*Amidon, J.*, in *Chicago, B. & Q. R. Co. v. United States*, 127 C. C. A. 438, 211 Fed. 12: "The trial court submitted to the jury the question whether the car was defective when it started from the Twelfth Street yard, or became defective in the course of

its journey from that yard to the Murray yard, charging them that if the defect arose while the car was in transit, the company would not be liable. The jury accepted the testimony of the Government inspectors, and found that the car was defective before it started upon the movement complained of. It is quite clear, therefore, that the company is not protected by the proviso upon which it relies. That is so far two reasons: First the defect was of a character that could have been supplied in the Twelfth Street yard. It consisted of a small clevis which had fallen out of the coupling appliance. This could have been supplied as well in one yard as the other, and a car can be moved for purposes of repair under the proviso only when such a movement is necessary; that is, when the repair is of a character which requires the taking of the car to some particular point. Second, the movement which is permitted must be for the purpose of making repairs, and the evidence showed that the movement complained of was not of that character."



nearest repair point if necessary to accomplish the repairs.<sup>7</sup>

**§ 852. All Movements of Cars from Repair Points Prohibited.** While a carrier may, without being subject to a penalty, move a car found to be defective from the place where it is discovered, to the nearest available point for repairs, any movement from the repair point, however, with defective appliances, renders the carrier liable to the statutory penalty. The exception created by the 1910 amendment contemplates only the movement of a car properly equipped which becomes defective while the car is being used by the carrier on its line and not at a repair point. A carrier has the right to move the car to the first repair point, but if it carries it beyond

7. *United States v. Chesapeake & O. R. Co.*, 130 C. C. A. 262, 213 Fed. 748; *United States v. Trinity & B. V. R. Co.*, 128 C. C. A. 120, 211 Fed. 448; *Galveston, H. & S. A. R. Co. v. United States*, 118 C. C. A. 339, 199 Fed. 891; *United States v. Southern Pac. Co.*, 167 Fed. 699; *United States v. Louisville & N. R. Co.*, 156 Fed. 195; *United States v. Louisville & N. R. Co.*, 156 Fed. 193.

*United States v. Rio Grande Western R. Co.*, 98 C. C. A. 293, 174 Fed. 399, in which Judge Sanborn said: "Complaint is made that the court charged the jury that if they believe from the evidence as to any particular count that the defendant moved the car therein specified, that when it was so moved its coupling apparatus was so defective that it would not couple automatically by impact, or could not be uncoupled without the necessity of a man going between the ends

of the cars coupled together, they should find the defendant guilty as to such count unless the movement and the only movement made was necessary for the purpose of repairing the defective coupler. If this instruction was correct in its application to the evidence upon the issues involved in the trial of any single count of the petition, it must be sustained. \* \* \* \* There was no evidence that this car was hauled over to the shop for any other purpose than to have the necessary repairs made upon it or that its trip to the shop tracks was or could have been used for any other purpose than to secure the making of these necessary repairs. In this state of the case the charge of the court was warranted by the decision and opinion of this court in *Chicago & N. W. Ry. Co. v. U. S.* (168 Fed. 236), and the judgment below is affirmed."

that point without discovery and without making the necessary repairs, it violates the statute.<sup>8</sup>

**§ 853. Illustrative Movements in Violation of 1910 Proviso.** Carriers were found guilty of violating the 1910 amendment under the following circumstances: A car on its arrival in a terminal yard in a train, was found to have a defective coupler. Shortly thereafter, a "bad order" mark was placed on it and it was thereupon switched about several times in the yard. Later in the day it was taken to another yard about three-quarters of a mile away, the trip consuming about ten minutes, where it remained for about twelve days without repairs. The car was again returned in that condition to the other yard where it was repaired. The movement was unlawful.<sup>9</sup> In another case a car was moved from one yard, known as the 12th Street yard, to another yard, known as the Murray yard. The company discovered the defect after the car moved into the Murray yard, but the government inspectors testified that they found the defect while the car was still in the 12th Street yard. The jury accepted the testimony of the government inspectors and found that the car was defective before it started upon the movement. The court held that the movement was illegal because the defect was of such a character that it could have been remedied in the 12th Street yard and further that the movement was not made for the purpose of repairs.<sup>10</sup>

8. *Pennsylvania Co. v. United States*, 154 C. C. A. 526, 241 Fed. 824; *United States v. Chesapeake & O. R. Co.*, 130 C. C. A. 262, 213 Fed. 748; *United States v. Colorado Midland Co.*, 121 C. C. A. 194, 202 Fed. 732; *Galveston, H. & S. A. R. Co. v. United States*, 118 C. C. A. 339, 199 Fed. 891; *United States v. Southern Pac. Co.*, 167 Fed. 699; *United States v. Atchison, T. & S. F. Ry. Co.*,

167 Fed. 696; *United States v. Chicago Great Western Ry. Co.*, 162 Fed. 775; *United States v. St. Louis, I. M. & S. R. Co.*, 154 Fed. 516.

9. *United States v. Chesapeake & O. R. Co.*, 130 C. C. A. 262, 213 Fed. 748.

10. *Chicago, B. & Q. R. Co. v. United States*, 127 C. C. A. 438, 211 Fed. 12.

**§ 854. Burden upon Carrier to Bring Itself Within Proviso of Act of 1910.** In order to avail itself of the benefit of the proviso of the Act of 1910 permitting the movement of a car under certain circumstances therein prescribed, the burden is upon the railroad company to clearly bring itself within the terms of the proviso before it can demand immunity, and it must establish the necessity of the movement alleged to have been made for the purpose of repairs, and it must show that the defect was of such a nature that it could not have been repaired where it was discovered.<sup>11</sup> Proof, therefore, that cars were hauled in a defective condition makes a *prima facie* case of a violation of the act.<sup>12</sup>

**§ 855. Defective Cars may be Hauled to Repair Points in Revenue Trains or with Other Cars Commercially Used.** A car properly equipped as required by the statute which becomes defective while being used upon a line of railroad, may, if necessary for that purpose, be hauled to the nearest available point for repairs either in revenue trains or in association with other cars which are commercially used; but if the car is so defective that chains must be used instead of drawbars to haul it, then it cannot be conveyed in association with other cars or in revenue trains unless it contains livestock or perishable freight. Such is the proper interpretation of the subproviso to Section 4 of the 1910 amendment which provides that nothing in the proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars in revenue trains or in

11. *Schlemmer v. Buffalo, R. & P. R. Co.*, 205 U. S. 1, 51 L. Ed. 681, 27 Sup. Ct. 407; *United States v. Chesapeake & O. R. Co.* 130 C. C. A. 262, 213 Fed. 748; *United States v. Atchison, T. & S. F. Ry. Co.*, 212 Fed. 1000; *United States v. Trinity & B. V. R. Co.*, 128 C. C. A. 120, 211 Fed. 448; *Chicago, B. & Q. R. Co. v.*

*United States*, 127 C. C. A. 438, 211 Fed. 12; *Galveston, H. & S. R. Co. v. United States*, 118 C. C. A. 339, 199 Fed. 891; *United States v. Atlantic Coast Line R. Co.*, 153 Fed. 918.

12. *Pennsylvania Co. v. United States*, 154 C. C. A. 526, 241 Fed. 824.

association with other cars that are commercially used unless such defective cars contain livestock or perishable freight. In two penal actions before the Federal Circuit Court of Appeals for the Sixth Circuit,<sup>13</sup> it appeared that a carrier had two yards, one known as the N. K. yard with no facilities for repairing cars and another known as the Brier Hill yard, both in the same city, where the carrier had facilities such as shops and repair tracks for repairing cars. Five cars, once properly equipped as provided by law, were discovered to be defective in the N. K. yard, and were hauled to the Brier Hill yard in a train in which there were other cars loaded with interstate traffic and in commercial use. None of the cars in the train contained livestock or perishable freight. The movement from the N. K. yard to the Brier Hill yard was necessary to make the required repairs and the Brier Hill yard was the nearest available point where the cars could be repaired. None of the cars were moved by means of chains instead of drawbars. Under these facts the District Court found the carrier guilty of violating the statute. In the appellate court the carrier contended that the subproviso referred only to cars on which the coupling devices were so defective that they had to be hauled by chains, and that, with the exception of cars required to be hauled by chains, all defective cars might be removed to repair points in revenue trains or in association with other cars commercially used. On the other hand, the government contended that the subproviso to Section 4 prohibited carriers from hauling defective cars either (a) by means of chains instead of drawbars or (b) in revenue trains, or (c) in association with other cars commercially used. The court, in rejecting the contention of the government, said: "The case must be decided, practically, as one of first impression; the question has not

13. *Erie R. Co. v. United States*, 153 C. C. A. 64, 240 Fed. 28.

been considered in any reported decision. We are convinced that the first construction is the right one; and several considerations persuade us to this end. . : . Since both constructions are open, it is merely to beg the question to say that the first is the natural and obvious one; yet this impression cannot be resisted, and is, in some measure, confirmed by observing that Mr. Justice Van Devanter said, in *United States v. Erie R. R.*, 237 U. S. 409, 35 Sup. Ct. 621, 624 (59 L. Ed. 1019), while reciting the effect of the subproviso according to what he evidently thought was the obvious meaning, that the subproviso 'declares that nothing therein shall be construed to permit the hauling of defective cars 'by means of chains instead of drawbars' in association with other cars in commercial use.' He evidently interprets the subproviso according to the construction which we have thought the right one; and this is some indication that it is the meaning naturally to be attributed to the language used. The construction which we adopt is, in our judgment, required by a broad view of the purpose and intent of the proviso. The general prohibition of the act had been most strictly construed. The amendment permitting hauling to a repair point tended to enlarge, and not to restrict, the rights of the carrier. The 'remedy' given by the amendment was to permit hauling to a repair point, and this amendment should be construed 'to advance the remedy.' Since it was often necessary that a defective car should be hauled in a revenue train from the point where the defect was discovered to some place where the car could at least be set out of the train, and since this necessity undoubtedly was one of the moving causes for the amendment of 1910, we see little room for doubt that the amendment was intended to permit such hauling in revenue trains as far as might be necessary to escape that strictness in the law which the amendment implied was unreasonable. In the form in which the amendment was first reported to Congress, it did not contain the subproviso.

We do not need expert testimony to know that where the coupler was defective only in that it would not couple and uncouple automatically, but was otherwise in good order, there was practically no danger resulting from this defect to the remainder of the train; the danger was to the employes—a subject kept unchanged by the amendment. It is equally clear that when the drawbars themselves were inoperative, and would not serve to pull the car, so that it was necessary to couple with chains, distinct danger resulted to the remaining cars. The amount of slack which often would exist would tend to result in injury to the air hose and to the cars and their contents, to say nothing about other adjacent cars in the train, or about the constant danger of breaking the train in two through breaking the chains. So it was clear that, while it would be comparatively unobjectionable to permit defective cars to be hauled a short distance in a revenue train, if the drawbars were operative, and if the liability to employes were preserved, it would be a very different thing and much more dangerous to permit cars to be hauled coupled by chains to a revenue train. There was, therefore, excellent reason for distinguishing and for refusing to permit the general permission given by the main body of the proviso to extend to the cars coupled by chains. From this point of view, the subproviso and its interpretation according to the first construction are most natural and tend to carry out the probable if not the certain intent of Congress. In getting the right viewpoint for the amendments of 1910, it is further to be remembered that, under the former acts, the conflict between the canons that a penal statute should be strictly construed and a (so-called) remedial statute liberally was resolved in favor of the latter view largely—and, it seems, mainly—in order to give effect to the supposed dominant intent of the law that the employes' right to recover for personal injuries should not be impaired by any relaxation of the restrictions; and this right the 1910 amendments expressly and fully preserve. However we interpret 'nearest available point,' and even

if 'hospital trains' of chained-up cars may be moved to a repair point, and even if defective cars not chained may be hauled in a revenue train to the nearest available repair point, this underlying purpose to give the employe an unimpaired right of action is not touched; he may recover, regardless of the fact that the movement to the repair point was perfectly lawful. The rule disappears when its reason does; hence the rule of construing strictly against the railroad the provisions of the act, as that rule was established before 1910, has its force distinctly lessened, at least, as applied to this amendment. Another consideration leading to the same result is that many cars are injured so that the drawbars will not work and so that chains must be used; these injuries occur everywhere and anywhere on the road; the necessity for moving, to suitable repair places, cars with this kind of injury, is often more apparent than with the cars that have less injuries; yet, upon the second construction, that favored by the government, cars so injured cannot be moved at all, and as to them the whole broad purpose of the proviso of section 4 utterly fails; they must be left where they are, beyond the reach of repair, and perhaps blocking the traffic; they cannot even be chained together to make a 'hospital train' and be hauled away for repairs. It would be even unlawful to chain up a single one to an engine and pull it away. The construction which leads to such results cannot be right; and yet the government's contention rests upon the proposition that the hauling of defective cars is absolutely prohibited (a) if in revenue trains; (b) if in association with other commercial cars; and (c) if the drawbars are so injured that chains must be used. Even if it be thought that the body of the proviso of section 4, omitting this subproviso, ought not to be interpreted so as to permit defective cars to be hauled even a few miles in a revenue train, that would not be controlling, when we give the subproviso what we must think its true meaning. When it prohibits hauling certain kinds of defective cars in revenue trains, and

does not extend the prohibition to other kinds, and where it is obviously attempting to make very precise and accurate regulations, it must follow from the familiar canons of construction that those other kinds are not included within the prohibitions; and this brings us to the same result, viz., that cars not so defective as to require chains in the place of drawbars may be hauled in revenue trains to the nearest available place of repairs."

**§ 856. Exceptions to the Safety Appliance Act Must be Strictly Construed.** All cars and movements excepted from the provisions of the safety appliance acts by Section 6 of the original act, Section 1 of the amendment of 1903 and Section 4 of the amendment of 1910 should be strictly construed. These statutory exemptions should not be so interpreted as to destroy the remedial purpose intended to be accomplished by the enactment of the statute.<sup>14</sup> Thus, in the case cited, it was contended that because cars on an interurban electric railroad ran for a short distance at a terminal over street railway tracks, such cars were exempted from all the provisions of the Safety Appliance Act because of the exception created by Section 1 of the 1903 amendment. But the court held that such an interpretation of the statute would be in direct conflict with the rule requiring exceptions from a general policy to be strictly construed, and would inevitably result in empowering a railroad company to place its cars beyond the provisions of a Safety Appliance Act by operating a train for a trifling distance over street railway tracks.

**§ 857. Exempted Movements for Repair do not Affect Liability for Personal Injuries.** The sole effect of permitting necessary movements for repairs under conditions named in the 1910 amendment, is to relieve

14. *Spokane & I. E. R. Co. v. United States*, 241 U. S. 344, 60 L. Ed. 1037, 36 Sup. Ct. 663.



the carrier from the penalty of a one hundred dollar fine under Section 6 of the original act. The statute expressly provides that such movement shall be at the sole risk of the carrier and nothing in the statute can be construed to relieve the railroad company from liability in any remedial action for the death or injury of any railroad employe caused to such employe by reason of, or in connection with the movement or hauling of such defective cars.

**§ 858. Cars on Interurban Railroads Moving Partly Over Street Railroad Tracks Not Exempted.** Section 1 of the 1903 amendment provides that cars "which are used on street railways" are excluded from the requirements of the original safety appliance act and all its amendments, although engaged in interstate commerce. This proviso, however, does not apply to cars on interurban electric railway lines which pass over street railway tracks for a short distance between the company's yards near the city limits and a station in the city.<sup>15</sup>

**§ 859. May Haul Defective Cars Containing Live-stock or Perishable Freight with Chains.** If the de-

15. *Spokane & I. E. R. Co. v. United States*, 241 U. S. 344, 60 L. Ed. 1037, 36 Sup. Ct. 668, in which Mr. Justice White said: "Again, it is urged that the judgment of the court below can be affirmed only by construing the word 'used' in the exception as meaning exclusively used,—a construction which, it is said, can be wholly unwarranted in view of the amendment of 1896, excepting from the act certain cars, etc., 'exclusively used for the transportation of logs,' and the demonstration thereby afforded if that such a meaning had been contemplated by Congress in the amendment of 1903, the word 'exclu-

sively' would have been employed. But we think the want of merit in the contention is clear and the unsoundness of the argument advanced to sustain them apparent. We say this because, while it is conceded that the obvious purpose of Congress in enacting the law and its amendments was to secure the safety of railroad employes, and that the amendment of 1903 sought to enlarge and made that purpose more complete, yet it is insisted that the exception in the act should receive such a broad construction as would destroy the plain purpose which caused the act to be adopted."

fective equipment discovered on a car while in use on the line, is such that chains instead of drawbars are required to haul it to the nearest repair point, the car cannot be hauled in revenue trains or in association with other cars that are commercially used, unless it contains livestock or perishable freight.<sup>16</sup>

**§ 860. Necessity of Movement for Repairs Generally a Question for the Jury.** In actions for penalties, carriers frequently defend 'on the ground that the particular movement was necessary for the purpose of repairs. The question whether, in fact, there existed a reasonable necessity for moving the defective car for repairs is ordinarily for the jury.<sup>17</sup>

**§ 861. Law as to Movement of Defective Cars Prior to 1910 Amendment.** Before the 1910 amendment, the statute made no exceptions as to movement of defective cars. Literally applied, the act inhibited any movement of a defective car even for purpose of repair. But the necessity of moving defective cars so discovered to be defective on the line to the nearest repair point, was so manifest that the courts carved an exception to the statute and generally held that defective cars might be moved to the nearest repair points provided they were excluded from commercial use and disassociated with cars so used.<sup>18</sup>

**§ 862. Cars Exempted from Requirements of Act on Interstate Highways not Subject to State Laws.**

16. Section 4 of the 1910 amendment, 36 St. at L. 298. Appendix G. *infra*.

17. *Galveston, H. & S. A. R. Co. v. United States*, 118 C. C. A. 339, 199 Fed. 891.

18. *Southern R. Co. v. Snyder*, 124 C. C. A. 60, 205 Fed. 868; *Southern R. Co. v. Snyder*, 109 C. C. A. 344, 187 Fed. 492; *United States v. Southern Pac. Co.*, 94

C. C. A. 629, 169 Fed. 407; *Chicago & N. W. R. Co. v. United States*, 93 C. C. A. 450, 168 Fed. 236, 21 L. R. A. (N. S.) 690; *United States v. Louisville & N. R. Co.*, 156 Fed. 193. *Contra*: *Chicago, M. & St. P. R. Co. v. United States*, 91 C. C. A. 373, 165 Fed. 423, 20 L. R. A. (N. S.) 473; *United States v. St. Louis, I. M. & S. R. Co.*, 154 Fed. 516.

The original act and all amendments specifically exempt from the requirements of the Safety Appliance Act trains composed of eight-wheel standard logging cars where the height of such cars from the top of a rail to center of coupling does not exceed twenty-five inches and to locomotives used exclusively in hauling such cars for the transportation of logs. The Legislature of the State of Texas passed a law which, upon its face, applied to logging cars and a prosecution was instituted in the state court for a failure to comply with the state law, the defendant being a carrier by railroad engaged in interstate commerce. The court held that as the railroad upon which the logging cars were operated was engaged in interstate commerce, the state law requiring certain appliances was inoperative and not applicable thereto, although no safety appliances were required on such cars by the national statute.<sup>19</sup> The court based its decision on a former opinion of the Supreme Court of the United States, holding that all cars, even if used in intrastate commerce, or railroads engaged in interstate commerce, were embraced within the Safety Appliance Act. Congress, having excluded cars of a certain kind, from the provisions of the act, a state law requiring certain appliances as to such cars, was invalid.

19. *State v. Orange & N. W. Ry. Co.*, — Tex. Civ. App. —, 181 S. W. 494.

## CHAPTER XLVIII.

### ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE UNDER SAFETY APPLIANCE ACT.

- Sec. 863. Assumption of Risk no Defense to Injuries Due to Violation of Safety Appliance Act.
- Sec. 864. Employee's Knowledge of Defect no Bar to a Suit.
- Sec. 865. Assumption of Risk When Two Distinct Acts of Negligence are Submitted.
- Sec. 866. Distinction between Assumption of Risk and Contributory Negligence.
- Sec. 867. Contributory Negligence a Defense Prior to Enactment of Employers' Liability Act.
- Sec. 868. Contributory Negligence no Defense When Injured Employee is Engaged in Interstate Commerce.
- Sec. 869. Contributory Negligence a Defense When Employee is Engaged in Intrastate Commerce.
- Sec. 870. State Statutes Abolishing Defense of Contributory Negligence Applicable under Safety Appliance Act, When.
- Sec. 871. Effect of Rule Forbidding Employees from Going Between Cars While in Motion.
- Sec. 872. Contributory Negligence a Defense to Failure to Have Air Brakes on Logging Trains on Interstate Railroads.
- Sec. 873. Contributory Negligence as a Matter of Law in Choosing Dangerous Way to Uncouple Cars with Safe Method Available.
- Sec. 874. Errorless Instructions on Contributory Negligence in Such Cases.
- Sec. 875. When Contributory Negligence is a Question for the Jury.
- Sec. 876. Illustrative Cases in which Employees Going Between Cars were Not Guilty of Contributory Negligence as a Matter of Law.

**§ 863. Assumption of Risk no Defense to Injuries Due to Violation of Safety Appliance Act.** In all actions for injuries to violations of the Safety Appliance Act, the defense of assumption of risk has been abrogated, for it is provided in Section 8 of the original act that no employee of any common carrier subject to the statute who may be injured by any locomotive, car, or train in use contrary to the provisions of the act, shall be deemed to have assumed the risk thereby occasioned, although continuing in the employment of

the carrier after the unlawful use of such locomotive, car or train may have been brought to his knowledge. This section applies to injuries resulting from a failure to comply with the amendatory acts as well as the original statute.<sup>1</sup>

1. **United States.** *Baugham v. New York, P. & N. R. Co.*, 241 U. S. 237, 60 L. Ed. 977, 36 Sup. Ct. 592, 13 N. C. C. A. 138; *Southern Ry. Co. v. Crockett*, 234 U. S. 725, 58 L. Ed. 1564, 34 Sup. Ct. 897; *Grand Trunk Western R. Co. v. Lindsay*, 233 U. S. 42, 58 L. Ed. 838, 34 Sup. Ct. 581, Ann. Cas. 1914C 168; *Schlemmer v. Buffalo, R. & P. R. Co.*, 220 U. S. 590, 55 L. Ed. 596, 31 Sup. Ct. 561; *Schlemmer v. Buffalo, R. & P. R. Co.*, 205 U. S. 1, 51 L. Ed. 681, 27 Sup. Ct. 407; *Columbia & P. S. R. Co. v. Sauter*, 139 C. C. A. 150, 223 Fed. 604; *Johnson v. Great Northern R. Co.*, 102 C. C. A. 89, 178 Fed. 643; *Norfolk & W. R. Co. v. Hazelrigg*, 95 C. C. A. 637, 170 Fed. 551; *Chicago, M. & St. P. R. Co. v. Voelker*, 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264; *Cleveland, C., C. & St. L. Ry. Co. v. Baker*, 33 C. C. A. 468, 91 Fed. 224.

**Arkansas.** *York v. St. Louis, I. M. & S. R. Co.*, 86 Ark. 244, 110 S. W. 803.

**Connecticut.** *Farley v. New York, N. H. & H. R. Co.*, 88 Conn. 409, 91 Atl. 650.

**Georgia.** *Atlantic Coast Line R. Co. v. Kennedy*, — Ga. App. —, 92 S. E. 973; *Charleston & W. C. Ry. Co. v. Sylvester*, 17 Ga. App. 85, 86 S. E. 275; *Kirbo v. Southern R. Co.*, 16 Ga. App. 49, 84 S. E. 491.

**Indiana.** *Cincinnati, H. & D. Ry. Co. v. Gross*, — Ind. App. —,

—, 111 N. E. 653.

**Iowa.** *Cook v. Union Pac. R. Co.*, — Iowa —, 158 N. W. 521.

**Kansas.** *Thornbro v. Kansas City, M. & O. R. Co.*, 91 Kan. 684, Ann. Cas. 1915D 314, 139 Pac. 410.

**Kentucky.** *Jones v. Southern Ry. in Kentucky*, 175 Ky. App. 455, 194 S. W. 558; *Young v. Norfolk & W. R. Co.*, 171 Ky. 510, 188 S. W. 621; *Truesdell v. Chesapeake & O. R. Co.*, 159 Ky. 718, 169 S. W. 471; *Chesapeake & O. R. Co. v. De Atley*, 159 Ky. 687, 167 S. W. 933.

**Minnesota.** *La Mere v. Railway Transfer Co. of City of Minneapolis*, 125 Minn. 159, Ann. Cas. 1915C 607, 145 N. W. 1068.

**Missouri.** *Young v. Lusk*, 268 Mo. 625, 187 S. W. 849; *Noel v. Quincy, O. & K. C. R. Co.* (Mo. App.), 182 S. W. 787.

**North Carolina.** *Sears v. Atlantic Coast Line R. Co.*, 169 N. C. 446, 86 S. E. 176; *Troxler v. Southern Ry. Co.*, 124 N. C. 189, 44 L. R. A. 313, 70 Am. St. Rep. 580, 32 S. E. 550.

**Oklahoma.** *Chicago, R. I. & P. Ry. Co. v. Jackson*, — Okla. —, 160 Pac. 736.

**Oregon.** *Oberlin v. Oregon Washington R. & Nav. Co.*, 71 Ore. 177, 142 Pac. 554.

**South Carolina.** *Steele v. Atlantic Coast Line R. Co.*, 103 S. C. 102, 87 S. E. 639.

**Texas.** *Chicago, R. I. & G. Ry. Co. v. De Bord*, — Tex. —,

**§ 864. Employee's Knowledge of Defect No Bar to a Suit.** Section 8 of the original act provides that knowledge of the existence of a defect in violation of the act does not bar an employee's action on the ground of assumption of risk. This principle was applied and a recovery permitted in a case where a brakeman was engaged in switching a "bad order" car from a spur track in a terminal yard to the machine shops nearby. In the course of his duties it became necessary for the brakeman to ride on top of the car in order to set the brake. While descending from the car he fell because of a defect in one of the handholds. While the accident occurred after the 1910 amendment was passed, yet the court held that Section 8 of the original act applied to all the provisions of the amendment of 1910 by reason of Section 5 thereof, which provides that all the provisions of the original act apply to the amendatory acts.<sup>2</sup>

**§ 865. Assumption of Risk When Two Distinct Acts of Negligence are Submitted.** When two distinct

192 S. W. 767; *Gulf, C. & S. F. Ry. Co. v. Cooper*, — Tex. Civ. App. —, 191 S. W. 579; *Missouri K. & T. Ry. Co. of Texas v. Barrington*, — Tex. Civ. App. —, 173 S. W. 595; *Missouri, O. & G. Ry. Co. v. Plemmons*, — Tex. Civ. App. —, 8 N. C. C. A. 265 171 S. W. 259; *Galveston, H. & S. A. Ry. Co. v. Kurtz*, — Tex. Civ. App. —, 147 S. W. 658; *Southern Pac. Co. v. Allen*, 48 Tex. Civ. App. 66, 106 S. W. 441.

**Washington.** *Lauer v. Northern Pac. R. Co.*, 83 Wash. 465, 145 Pac. 606.

**West Virginia.** *Hull v. Virginian R. Co.*, 78 W. Va. 25, 88 S. E. 1060.

**Wisconsin.** *Hovaneck v. Great Northern R. Co.*, 165 Wis. 511,

162 N. W. 927; *Smiegl v. Great Northern R. Co.*, 165 Wis. 57, 160 N. W. 1057.

2. *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. Ed. 874, 36 Sup. Ct. 482.

"Under the statutes quoted above and the decision made in *Railway Co. v. Kurtz*, *supra*, if it be conceded that appellee knew the handhold which gave way and caused him to fall, was defective, he did not assume the risk of using it. There is no pretense that he produced the defective condition of the handhold, and it seems that in no other event would the defense of assumed risk be available to appellant." *Missouri, O. & G. Ry. Co. v. Plemmons*, — Tex. Civ. App. —, 8 N. C. C. A. 265, 171 S. W. 259.

acts of negligence are relied upon in personal injury actions, one being a violation of the Safety Appliance Act and the other not, each party is entitled to have instructions properly declaring the law as to both of the negligent acts. While assumption of risk is not a defense as to any violation of the Safety Appliance Act, yet if in the same petition another act of negligence is pleaded to which assumption of risk may be a defense, the defendant has the right to charge on assumption of risk as to that act of negligence.<sup>3</sup>

**§ 866. Distinction between Assumption of Risk and Contributory Negligence.** If the injured employe was engaged in interstate commerce, the distinction between assumption of risk in actions for violation of the Safety Appliance Act is not material for both defenses are abolished by Section 3 and Section 4 of the Employers' Liability Act. However, if the employe was engaged in intrastate commerce, contributory negligence is a defense but the Safety Appliance Act provides that no employe shall be held to have assumed the risk of injury by reason of failure to equip cars as required by the act should he continue to remain in the employment with knowledge of such failure. The distinction, therefore, between contributory negligence and assumption of risk may become important in actions for violation of the Act. There is a practical and clear distinction between assumption of risk and contributory negligence. Contributory negligence is the omission on the part of an employe to use those precautions for his own safety which ordinary prudence dictates. On the other hand, assumption of risk includes those dangers which are the ordinary risks of the occupation and also those risks and dangers which are known or are so plainly observable that an employe may be presumed to know them.<sup>4</sup>

3. Chicago, M. & St. P. R. Co. v. Voelker, 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264.

4. Schlemmer v. Buffalo, R. & P. R. Co., 220 U. S. 590, 55 L. Ed. 596, 31 Sup. Ct. 561.

**§ 867. Contributory Negligence a Defense Prior to Enactment of Employers' Liability Act.** Before the passage of the Federal Employers' Liability Act, contributory negligence was in all cases a defense under the Safety Appliance Act for there is nothing in the Safety Appliance Act absolving the employe from the duty of using ordinary care to protect himself from injury.<sup>5</sup> The proviso to section 3 of the Federal Employers' Liability Act, in effect, amends the Safety

5. *Schlemmer v. Buffalo, R. & P. R. Co.*, 220 U. S. 590, 55 L. Ed. 596, '31 Sup. Ct. 561, affirming 222 Pa. 470, 71 Atl. 1053. Mr. Justice Day, said: "In the present case the statute of Congress expressly provides that the employe shall not be deemed to have assumed the risk of injury if such is occasioned by his continuing in the employ of the carrier after the unlawful use of the car or train in the failure to provide automatic couplers has been brought to his knowledge. Therefore, when Schlemmer saw that the shovel-car was not equipped with an automatic coupler he would not from that knowledge alone, take upon himself the risk of injury without liability from his employer. But there is nothing in the statute absolving the employe from the duty of exercising ordinary care to protect himself from injury in the use of the car with the appliances actually furnished. In other words, notwithstanding the company failed to comply with the statute, the employe was not for that reason absolved from the duty of using ordinary care for his own protection under the circumstances as they existed. This has been the holding of the courts in construing statutes enacted to

promote the safety of employes. *Krause v. Morgan*, 53 Oh. St. 26; *Holum v. Railway Co.*, 80 Wisconsin 299; *Grand v. Railway Co.*, 83 Michigan 564; *Taylor v. Manufacturing Co.*, 143 Massachusetts 470. And such was the holding of the Court of Appeals of the Eighth Circuit, where the statute now under consideration was before the court. *Denver & Rio Grande R. R. Co. v. Arrighi*, 129 Fed. Rep. 347. In the absence of legislation, at the time of the injury complained of, taking away the defense of contributory negligence, it continued to exist."

*Hook, J. in Denver & R. G. R. Co. v. Arrighi*, 63 C. C. A. 649, 129 Fed. 347: "It cannot be assumed that by the passage of a salutary law designed for the protection of those engaged in a hazardous occupation Congress intended to offer a premium for carelessness, or to grant immunity from the consequences of negligence. The reasonable conclusion is that the defense of contributory negligence is as available to a railroad company after as before the passage of the act of Congress, although it has not complied with its requirements". Accord: *Toledo, St. L. & W. R. Co. v. Gordon*, 100 C. C. A. 572, 177 Fed. 152; *Popplar v. Minnea-*



Appliance Act so that contributory negligence is not now a defense in all actions for personal injuries due to a violation of the Act if the employe was engaged in interstate commerce.<sup>6</sup> But as the Safety Appliance Act is broader in its scope than the Federal Employers' Liability Act, that is, includes cars used in intrastate commerce as well as interstate commerce, contributory negligence may be a defense under that act if the

polis, St. P. & S. S. M. R. Co., 121 Minn. 413, Ann. Cas. 1914D 383, 141 N. W. 798.

6. **United States.** Baltimore & O. R. Co. v. Wilson, 242 U. S. 295, 61 L. Ed. 312, 37 Sup. Ct. 123; Spokane & I. E. R. Co. v. Campbell, 241 U. S. 497, 60 L. Ed. 1125, 36 Sup. Ct. 683, 12 N. C. C. A. 1083; Great Northern R. Co. v. Otos, 239 U. S. 349, 60 L. Ed. 322, 36 Sup. Ct. 124; Atchison, T. & S. F. R. Co. v. Swearingen, 239 U. S. 339, 60 L. Ed. 317, 36 Sup. Ct. 221; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635, 8 N. C. C. A. 834, L. R. A. 1915C 1, Ann. Cas. 1915B 475; Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 58 L. Ed. 838, 34 Sup. Ct. 581, Ann. Cas. 1914C 168; Johnson v. Great Northern R. Co., 102 C. C. A. 89, 178 Fed. 643.

**Alabama.** Western Ry. of Alabama v. Mays, 197 Ala. 367, 72 So. 641.

**Arkansas.** St. Louis Southwestern Ry. Co. v. Anderson, 117 Ark. 41, 173 S. W. 834.

**California.** Smithson v. Atchison, T. & S. F. R. Co., 174 Calif. 148, 162 Pac. 111.

**Kansas.** Thornbro v. Kansas City, M. & O. Ry. Co., 91 Kan. 684, Ann. Cas. 1915D 314, 139 Pac. 410.

**Minnesota.** La Mere v. Railway Transfer Co. of City of Minneapolis, 125 Minn. 159, Ann. Cas. 1915C 607, 145 N. W. 1068; Demerco v. Minneapolis, St. P. & S. M. R. Co., 122 Minn. 171, 142 N. W. 145; Ahrens v. Chicago, M. & St. P. R. Co., 121 Minn. 335, 141 N. W. 297.

**Missouri.** Christy v. Wabash R. Co., 195 Mo. App. 232, 191 S. W. 241; Young v. Lusk, 268 Mo. 625, 187 S. W. 849; Moore v. St. Joseph & G. I. R. Co., 268 Mo. 31, 186 S. W. 1035; Noel v. Quincy, O. & K. C. R. Co. (Mo. App.), 182 S. W. 787; Carpenter v. Kansas City Southern Ry. Co., 189 Mo. App. 164, 175 S. W. 234.

**New Jersey.** Parker v. Atlantic City R. Co., 87 N. J. L. 148, 93 Atl. 574

**North Carolina.** Sears v. Atlantic Coast Line R. Co., 169 N. C. 446, 86 S. E. 176; Montgomery v. California & N. W. R. Co., 169 N. C. 249, 85 S. E. 139.

**South Carolina.** Steele v. Atlantic Coast Line R. Co., 103 S. C. 102, 87 S. E. 639.

**South Dakota.** Fletcher v. South Dakota Cent. R. Co., 36 S. Dak. 401, 155 N. W. 3.

**Washington.** Lauer v. Northern Pac. R. Co., 83 Wash. 465, 145 Pac. 606.

injured employe was engaged in intrastate commerce or in work that is not commerce at all.<sup>7</sup>

**§ 868. Contributory Negligence no Defense When Injured Employe is Engaged in Interstate Commerce.** In personal injury actions for casualties caused by failure to comply with the Safety Appliance Act, contributory negligence of the injured employe was a bar in all cases prior to the passage of the act of Congress commonly known as the Federal Employers' Liability Act. But since the passage of the Employers' Liability Act, no employe engaged in interstate commerce and injured through a violation of the Safety Appliance Act, shall be deemed guilty of contributory negligence. The Federal Employers' Liability Act, however, is confined solely to employes injured while working in interstate commerce, and hence none of its provisions apply if the employe was not at the time of the injury engaged in interstate commerce. The Safety Appliance Act, though is, in some respects, broader in its application than the Employers' Liability Act for it includes all vehicles on interstate railroads even when wholly used in intrastate commerce. Employes injured, therefore, while working in intrastate commerce by reason of defects in violation of the Safety Appliance Act, on cars while used in intrastate commerce, have a cause of action under the Safety Appliance Act, but they are not in such cases under the protection of the Employers' Liability Act. Hence, in actions for violation of the Safety Appliance Act, the question of employment in interstate commerce is still material in determining whether the provision of the Federal Employers' Liability Act abolishing contributory negligence is applicable.

**§ 869. Contributory Negligence a Defense When Employe is Engaged in Intrastate Commerce.** If an

7. Minneapolis, St. P. & S. S. 369, 59 L. Ed. 1000, 35 Sup. Ct. M. R. Co. v. Popplar, 237 U. S. 609.

employe is engaged in intrastate commerce at the time he receives an injury through a non-compliance of the carrier with the provisions of the Safety Appliance Act, his contributory negligence, i. e., his failure to exercise such care as a reasonably prudent person would have exercised under the same circumstances, is a bar. Illustrating, a switchman engaged exclusively in moving cars containing merchandise from one point to another in the same state if injured because of the carrier's failure to equip its cars as provided in the Safety Appliance Act has no right of action if his negligence also contributed directly to cause the injury.<sup>8</sup> But if any of the cars mentioned contained any merchandise consigned to a point in one state from a point in another, the contributory negligence of the employe would not bar a recovery nor even reduce the damages if a failure to comply with the Safety Appliance Act contributed to cause his death or injury.

**§ 870. State Statutes Abolishing Defense of Contributory Negligence Applicable under Safety Appliance Act, When.** The Supreme Court of the United States in a personal injury action for failure to maintain an automatic coupler as required by the statute, when the injured employe at the time was working exclusively in intrastate commerce—moving a car between two points in the same state—seems to have decided that, in such cases, the question whether contributory negligence is

8. Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 317, 57 L. Ed. 1204, 33 Sup. Ct. 840, 3 N. C. C. A. 826; Schlemmer v. Buffalo, R. & P. R. Co., 220 U. S. 590, 55 L. Ed. 596, 31 Sup. Ct. 561; Schlemmer v. Buffalo, R. & P. R. Co., 205 U. S. 1, 51 L. Ed. 681, 27 Sup. Ct. 407; Johnson v. Great Northern R. Co., 102 C. C. A. 89, 178 Fed. 643; Toledo, St. L. & W. R. Co. v. Gordon, 100 C. C. A. 572, 177 Fed. 152; Donegan v. Baltimore & N. Y. R. Co., 91 C. C. A.

555, 165 Fed. 869; Denver & R. G. R. Co. v. Arrighi, 63 C. C. A. 649, 129 Fed. 347; Cleveland C. C. & St. L. Ry. Co. v. Baker, 33 C. C. A. 468, 91 Fed. 224; Winkler v. Philadelphia & R. R. Co., 4 Pennew. (Del.) 80, 53 Atl. 90; Grand Trunk Western Ry. Co. v. Poole, 175 Ind. 567, 93 N. E. 26; Kansas City, M. & B. R. Co. v. Plippo, 138 Ala. 487, 35 So. 457; Popplar v. Minneapolis, St. P. & S. S. M. R. Co., 121 Minn. 413, Ann. Cas. 1914D 383, 141 N. W. 798.

a defense is to be determined by the law of the state.<sup>9</sup> However, this was not the exact point at issue in the Popplar case for the reason that the state court held that contributory negligence was a defense if the employe was not engaged in interstate commerce, and further decided that, under the facts, the employe was not guilty of contributory negligence as a matter of law. The national Supreme Court refused to pass on this latter phase of the case for the reason that it was not a federal question, the court saying that except as to liability under the statute, the right of the plaintiff to recover was entirely dependent upon the common law of the state *except as it might be modified by legislation*. The seeming inference from this holding is that if, by the statute of the state, contributory negligence is not a defense, then it is not a defense in that state even in actions under the Federal Safety Appliance Act if the employe was not engaged in interstate commerce. If this conclusion is correct, then as to intrastate employes only, contributory negligence in actions under the Federal Safety Appliance Act may be a defense in one state and not in another, depending entirely upon whether the particular state where the action is prosecuted has, by statute or otherwise, abolished the common law defense of contributory negligence.

**§ 871. Effect of Rule Forbidding Employes from Going Between Cars While in Motion.** If an employe of a carrier voluntarily goes between cars, while in motion, to couple or uncouple them, in violation of a rule of his employer forbidding such practice, he is guilty of contributory negligence.<sup>10</sup> Applying this rule, it was held in the case cited, that a trial court erred in refusing the following request for instruction: “ ‘ If you believe from the weight of the evidence that at the time

9. Minneapolis, St. P. & S. S. M. R. Co. v. Popplar, 237 U. S. 369, 59 L. Ed. 1000, 35 Sup. Ct. 609.

10. Cleveland, C. C. & St. L. Ry. Co. v. Baker, 33 C. C. A. 468, 91 Fed. 224.

of the accident there was a rule of the defendant company known to the plaintiff, forbidding the employes of the company from going between cars in motion to uncouple them, and that plaintiff voluntarily violated this rule, and, in consequence thereof, was injured, he cannot recover for such injury from the defendant company.' '' But if the evidence discloses that such a rule was habitually violated with the tacit approval and acquiescence of the employer, the employe is not guilty of contributory negligence in going between cars to couple with or uncouple them while in motion.<sup>11</sup>

**§ 872. Contributory Negligence a Defense to Failure to Have Air Brakes on Logging Trains on Interstate Railroads.** The Safety Appliance Act prescribes that its provisions shall not apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of each car, from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs. Contributory negligence is eliminated as a defense only when a violation of the Safety Appliance Act contributes as a cause to an injury. It follows, therefore, that a carrier is not precluded from setting up the defense of contributory negligence when cars within the foregoing exception are not equipped with air brakes.<sup>12</sup>

**§ 873. Contributory Negligence as a Matter of Law in Choosing Dangerous Way to Uncouple Cars with Safe Method Available.** Before the enactment of the Federal Employers' Liability Act, the question was frequently raised and presented in the Federal courts and some state courts in personal injury actions for violations of the Safety Appliance Act in failing to

11. *Brady v. Kansas City, St. L. & C. R. Co.*, 206 Mo. 509, 102 S. W. 978

12. *Mathis v. Kansas City Southern R. Co.*, 140 La. 855, 74 So. 172.

maintain the couplers required by statute, whether employees were guilty of contributory negligence as a matter of law in voluntarily choosing to go between the cars while moving slowly to uncouple them upon failure of the automatic coupler to work with the use of the side lever, when, with knowledge of the conditions, they could have effected the same result, the separation of the cars, by stopping the cars or by going around or over the cars and pulling the automatic lever on the other side of the adjacent car. Some of the courts held that an employee who attempted to uncouple cars, under such circumstances, by stepping between them was guilty of contributory negligence as a matter of law for the reason that, with knowledge of the situation, he chose a dangerous way to uncouple the cars when a comparatively safe method was open.<sup>13</sup> Other courts held that the employee's contributory negligence, in such cases, was a question to be passed upon by the jury under proper instructions defining the rule.<sup>14</sup>

13. *Norfolk & W. R. Co. v. Hazelrigg*, 95 C. C. A. 637, 170 Fed. 551; *Union Pac. R. Co. v. Brady*, 88 C. C. A. 579, 161 Fed. 719; *Suttle v. Choctaw, O. & G. R. Co.*, 75 C. C. A. 470, 144 Fed. 668; *Gilbert v. Burlington, C. R. & N. R. Co. et al*, 63 C. C. A. 27, 128 Fed. 529; *Morris v. Duluth, S. S. & A. Ry. Co.*, 47 C. C. A. 661, 108 Fed. 747.

14. *Nichols v. Chesapeake & O. R. Co.*, 115 C. C. A. 601, 195 Fed. 913; *Norfolk & W. R. Co. v. Hazelrigg*, 107 C. C. A. 66, 184 Fed. 828; *Donegan v. Baltimore & N. Y. R. Co.*, 91 C. C. A. 555, 165 Fed. 869; *United States v. Denver & R. G. R. Co.*, 90 C. C. A. 329, 163 Fed. 519; *St. Louis, I. M. & S. R. Co. v. York*, 92 Ark. 554, 123 S. W. 376; *Popplar v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 121 Minn. 413, Ann. Cas. 1914D 383,

141 N. W. 798; *Johnston v. Chicago Great Western R. Co.*, — Mo. App. —, 164 S. W. 260; *Yost v. Union P. R. Co.*, 245 Mo. 219, 149 S. W. 577; *Brady v. Kansas City, St. L. & C. R. Co.*, 206 Mo. 509, 102 S. W. 978, 105 S. W. 1195.

In *Norfolk & W. R. Co. v. Hazelrigg*, *supra*, the court analyzed the cases cited in the preceding note and endeavored to show that the cases were in harmony. The court said: "In support of the requested instruction defendant cites four decisions of the Circuit Court of Appeals for the Eighth Circuit, namely, *Morris v. Duluth, S. S. & A. Ry. Co.*, 108 Fed. 747, 47 C. C. A. 661, *Gilbert v. Burlington C. R. & N. R. Co.*, 128 Fed. 529, 63 C. C. A. 27, *Suttle v. Choctaw, O. & G. R. Co.*, 144 Fed. 668, 75 C. C. A. 470, and *Union Pacific Ry. Co. v. Brady* 161 Fed. 719, 88

The authority of the conclusion reached in the first cases cited has been considerably shaken, and the soundness of the decisions in the cases last cited, seems to have been confirmed by a subsequent decision of the national Supreme Court, in which Mr. Justice McKenna, for the court, said (3):<sup>15</sup> "Contributory negligence is asserted because Brown knew, as it is contended, that he would have to pass over an unblocked guard rail; that, besides, he controlled the situation, it is contended, through signals to the engineer, and that he had two safe methods in which to make the cut of the cars but voluntarily and for his own purpose chose most dangerous method. But all these facts and how far they

C. C. A. 579, each of which cases involved an injury to one engaged in switching by stepping between the cars upon the failure of the lever to work, and without attempting to use the lever on the other side of the train; the rule being laid down that, where there is a comparatively safe and less dangerous way known to a servant by means of which he may discharge his duty, it is negligent in him to select the more dangerous method. In the Morris, Gilbert, and Suttle cases it was held that the act of the brakeman in going between the cars instead of using the lever on the opposite side was negligence as a matter of law. The Brady case is in harmony with the other three cases. We think the case before us is readily distinguishable upon its facts from each of the four cases cited. In the Morris case the injured employee was the head brakeman of a crew of employees. He stepped between moving cars in the dark. The lever on the opposite side was in working order. In the Gilbert case the plaintiff was head brakeman of the switching

crew, and was directing the movements of the train. He likewise stepped between moving cars. The couplers on both sides were in good working order, but the one on his side could not be pulled because the 'slack was tight.' In the Suttle case the lever on the brakeman's side was temporarily disconnected, but the one on the other side was all right, and the brakeman could have reached and draw the pin in safety by going on the platform of the caboose. Instead of doing so, he went between moving cars in the nighttime. In the Brady case plaintiff was foreman of the switching crew, and had had 12 years' experience as brakeman, switchman and yardmaster. He knew it was not uncommon for a coupling appliance to require several jerks of the lever to uncouple. While he was between the cars after dark, the cars were moved through the negligence of a fellow servant."

15. Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 317, 57 L. Ed. 1204, 33 Sup. Ct. 840, 3 N. C. C. A. 826.

should have affected his conduct were submitted to the jury. The evidence detailed the situation to them and whether the judgment of Brown was prudently formed and exercised. The trial court and the Circuit Court of Appeals, considering the evidence, confirmed the finding of the jury expressed by its verdict. It would be going far to say that these concurring judgments are not such as could be reasonably formed but such as must be pronounced to be without foundation as a matter of law. The railway company starts its contentions with a concession of its own culpability in sending Brown to his duty to encounter defective appliances and then seeks to relieve itself from liability by a charge against him of a careless judgment in its execution. But some judgment was necessary, and whether he should have selected one of the ways which counsel point out admits of debate. It is one thing to judge of a situation in cold abstraction; another thing to form a judgment on the spot."

**§ 874. Errorless Instructions on Contributory Negligence in Such Cases.** In a personal injury action for a violation of the Safety Appliance Act, it was contended that the plaintiff was negligent in voluntarily choosing a dangerous way to uncouple the cars when a safe method was open, and it was held that the refusal to give the following instruction was error: "The court further charges the jury that if they shall believe and find from the evidence that, at the time and upon the occasion of receiving the injuries sued for, the plaintiff was himself negligent, and by his own negligence contributed to the injuries sustained by him and sued for herein, and that, but for which negligence upon the part of plaintiff, if any there was, such injury could not have happened to or been sustained by him, then they must find for defendant."<sup>16</sup> And on second appeal of the same case the following instruction was

16. *Norfolk & W. R. Co. v. Hazelrigg*, 95 C. C. A. 637, 170 Fed. 551.



given by the trial court and approved by the Federal Circuit Court of Appeals: "The question, then, is whether or not a brakeman of ordinary care and prudence, with such experience as plaintiff in this case had and with such knowledge of railroading as he had; and under existing conditions—i. e., under like circumstances—would or not have appreciated the danger of going in between those cars, and have refrained from going in between them, and, instead of doing so, would have called over to the conductor to operate the lever on his side, or himself have gone around and operated that lever or otherwise acted. If you believe from the evidence that a brakeman of ordinary care and prudence under like circumstances, would have appreciated that danger, and would not have gone in between these cars, but would have called across to the conductor, or would have gone around and pulled the other lever himself, or acted otherwise than going between the cars, there can be no recovery in this case."<sup>17</sup> Another approved instruction on the same subject was the following: "It is also the law, having in mind still this first count, that if the employe goes between the cars to effect an uncoupling, he is not chargeable with contributory negligence, that is, a failure to exercise ordinary care for his own safety, by the mere fact of going in between the cars to effect the uncoupling, but he is required before he can recover to exercise ordinary care for his own safety after he goes between the cars and while he is there endeavoring to effect an uncoupling, that is, the separation of the cars."<sup>18</sup> Another charge on contributory negligence specifically approved by the Supreme Court was as follows: "If you conclude that he did that as a reasonably prudent man with his experience and his observation and the facts and circumstances in the case as I have detailed or

17. *Norfolk & W. R. Co. v. Hazelrigg*, 107 C. C. A. 66, 184 Fed. 828.

18. *Chicago, R. I. & P. R. Co. v. Brown* 229 U. S. 317, 57 L. Ed. 1204, 33 Sup. Ct. 840, 3 N. C. C. A. 826.

undertaken to state them here and if you believe that that was done as a reasonably prudent man would have done it, then he would not be barred in this action; but if you believe that his conduct in the manner in which he attempted to couple that car, was such that a reasonably prudent man situated as he was under all the facts and circumstances that surrounded him there, would not have attempted to do it, and that it was a negligent way to attempt to do it, and such a negligent way as a reasonably prudent man with his experience and observation would not have attempted, then he would be guilty of negligence."<sup>19</sup>

**§ 875. When Contributory Negligence is a Question for the Jury.** When the evidence is such on the question or contributory negligence that reasonable minds may draw different inferences therefrom, then the question of an employe's contributory negligence becomes a matter for the jury to pass upon; but where the facts are undisputed and are such that all reasonable minds must reach the same conclusion, then the question of contributory negligence is one of law.<sup>20</sup>

**§ 876. Illustrative Cases in which Employes Going Between Cars were Not Guilty of Contributory Negligence as a Matter of Law.** A switchman after repeated unsuccessful efforts to uncouple two cars by means of the pin lifter, stepped between them as they were moving slowly and attempted to move the coupling pin with his fingers, which he was unable to do. He then attempted to reach the pin on the ad-

19. *Delk v. St. Louis & S. F. R. Co.*, 220 U. S. 580; 55 L. Ed. 590, 31 Sup. Ct. 617

20. *Delk v. St. Louis & S. F. R. Co.*, 220 U. S. 580, 55 L. Ed. 590, 31 Sup. Ct. 617; *Johnson v. Great Northern R. Co.*, 102 C. C. A. 89, 178 Fed. 643; *Donegan v. Baltimore & N. Y. R. Co.*, 91

C. C. A. 555, 165 Fed. 869; *Devine v. Chicago & C. R. R. Co.*, 259 Ill. 449, 102 N. E. 803; *La Mere v. Railway T. Co.*, 125 Minn. 159, Ann. Cas. 1915C 607, 145 N. W. 1068; *Johnson v. Chicago Great Western R. Co.*, — Mo. App. —, 164 S. W. 260.

jacent coupler which projected away from him. As he did so, his foot slipped and struck a low breakbeam which shoved it into an unblocked guard rail where his leg was cut off. The court held that he was not guilty of contributory as a matter of law in voluntarily choosing one of two methods to effect the separation of the cars, or in failing to anticipate that his foot might be caught in an open frog rail.<sup>21</sup>

21. Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 317, 57 L. Ed. 1204, 33 Sup. Ct. 840, 3 N. C. C. A. 826, Johnson v. Chicago Great Western R. Co., (Mo. App.), 164 S. W. 260; Brady v. Kansas City, St. L. & C. R. Co., 206 Mo. 509, 102 S. W. 978, 105 S. W. 1195.

## CHAPTER XLIX.

### PLEADING AND PRACTICE IN PERSONAL INJURY CASES.

- Sec. 877. Rights under Statute for Personal Injuries May be Enforced in State Courts.
- Sec. 878. Procedure Controlled by State Rules.
- Sec. 879. Petition in Personal Injury Cases Need Specifically Refer to Statute.
- Sec. 880. Plaintiff Not Required to Negative Provisos.
- Sec. 881. Allegation as to Use of Car in Moving Intrastate Traffic.
- Sec. 882. Submitting Case under Safety Appliance Act Without Allegation of Interstate Employment not Error, When.
- Sec. 883. Judicial Notice of Orders of Commission under Safety Appliance Act.
- Sec. 884. Federal Statute of Limitation Controls When Employee is Engaged in Interstate Commerce.
- Sec. 885. State Statute of Limitation Controls in Absence of Interstate Employment.
- Sec. 886. Effect of Amendment Stating a New Cause of Action After Statute has Run.

**§ 877. Rights under Statute for Personal Injuries May be Enforced in State Courts.** The enforcement of rights under the Safety Appliance Act in personal injury actions is not restricted to the federal courts. The state courts must always hold themselves open for the prosecution of civil rights growing out of the laws of the United States.<sup>1</sup> A federal statute specifically provides that the district courts of the United States shall have concurrent jurisdiction with the courts of the several states in suits of civil nature.<sup>2</sup> The plain implication from this statute is that state

1. Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. Ed. 961, 36 Sup. Ct. 595, L. R. A. 1917A 86, Ann. Cas. 1916E 505; Defiance Water Co. v. Defiance, 191 U. S. 184, 48 L. Ed. 140; 24 Sup. Ct. 63; Missouri Pac. Ry. Co. v. Fitzgerald, 160 U. S. 556, 40 L. Ed. 536, 16 Sup. Ct. 389; City of New Orleans v. Benjamin, 153 U. S. 411, 38 L. Ed. 764, 14 Sup. Ct. 905; Robb v. Connolly, 111 U. S. 624, 28 L. Ed. 542, 4 Sup. Ct. 544; Chicago & A. R. Co. v. Wiggins Ferry Co, 108 U. S. 18, 27 L. Ed. 636, 1 Sup. Ct. 614, 617; Ex Parte Siebold, 100 U. S. 371, 25 L. Ed. 717; Claffin v. Houseman, 93 U. S. 130, 23 L. Ed. 833; The Fullerton, 92 C. C. A. 463, 167 Fed. 1.

2. Judicial Code, sec. 27.

courts have jurisdiction of civil actions under federal laws.<sup>3</sup> The same conclusion was reached by the United States Supreme Court as to actions under the Federal Employers' Liability Act even before the 1910 amendment.<sup>4</sup> The duty of the state courts as to actions

3. *Claffin v. Houseman*, 93 U. S. 130, 23 L. Ed. 833, in which the court said: "The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent, and, within its jurisdiction, paramount sovereignty. \* \* \* If an act of Congress gives a penalty (meaning civil and remedial) to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. \* \* \* It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as

was so clearly shown by Chief Justice Taney, in the case of *Ableman v. Booth*, 21 How. 506; and hence the state courts have no power to revise the action of the Federal Courts, nor the Federal the state, except where the Federal Constitution or laws are involved. But this is no reason why the state courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied."

4. *In re Second Employers' Liability Cases*, 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44, Mr. Justice Van Devanter, for the court, saying: "We come next to consider whether rights arising under the congressional act may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion. The first of the cases now before us was begun in one of the Superior Courts of the State of Connecticut, and, in that case, the Supreme Court of Error of the State answered the question in the negative. That, however, was not because the ordinary jurisdiction of the Superior Courts, as defined by the Constitution and laws of the State, was deemed inadequate or not adapted to the adjudication of such a case, but because the Supreme Court of Errors was of opinion (1) that the congression-

under national laws dealing with subject matters of interstate commerce is well stated by Mr. Justice Shiras in *Murray v. Chicago & N. W. Ry. Co.*,<sup>5</sup> as follows: "A further point is made in support of the demurrer, to the effect that this court succeeds only to the jurisdiction of the state court in which the action was originally brought, and that state courts have no jurisdiction over cases arising out of interstate commerce, the argument being that, as the State can not legislate touching interstate commerce, the state courts are without power to determine cases of the like character. This position is not well taken. The limitations upon the legislative power of the nation and of the

al act impliedly restricts the enforcement of the rights which it creates to the Federal courts, and (2) that, if this be not so, the Superior Courts are at liberty to decline cognizance of actions to enforce rights arising under that act, because (a) the policy manifested by it is not in accord with the policy of the State respecting the liability of employers to employes for injuries received by the latter while in the service of the former, and (b) it would be inconvenient and confusing for the same court, in dealing with cases of the same general class, to apply in some the standards of right established by the congressional act and in others the different standards recognized by the laws of the state. We are quite unable to assent to the view that the enforcement of the rights which the congressional act creates was originally intended to be restricted to the Federal courts. The act contains nothing which is suggestive of such a restriction, and in this situation the intention of Congress was reflected by the provision in the general jurisdic-

tional act, "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States." August 13, 1888, 25 Stat, 433. c. 866, Sec. 1. *Robb v. Connolly*, 111 U. S. 624, 637; *United States v. Barnes*, 222 U. S. 513. This is emphasized, by the amendment engrafted upon the original act in 1910, to the effect that "The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any court of competent jurisdiction shall be removed to any court of the United States." The amendment, as appears by its language, instead of granting jurisdiction to the state courts, presupposes that they already possessed it."

5. 62 Fed. 24.

several states do not necessarily apply to the judicial branches of the national and state governments. The legislation of a state can not abrogate or modify any of the provisions of the Federal Constitution nor of the acts of Congress touching matters within congressional control, but the courts of the State, in the absence of a prohibitory provision in the Federal Constitution or acts of Congress, have full jurisdiction over cases arising under the Constitution and laws of the United States. The courts of the States are constantly called upon to hear and decide cases arising under the Federal Constitution and laws, just as the courts of the United States are called upon to hear and decide cases arising under the law of the State when the adverse parties are citizens of different States. The duty of the court is to explain, apply, and enforce the existing law in the particular cases brought before them. If the law applicable to a given case is of federal origin, the legislature of the State can not abrogate or change it, but the courts of the State may apply and enforce it; and hence the fact that a given subject, like interstate commerce, is beyond legislative control does not, ipso facto, prevent the courts of the State from exercising jurisdiction over cases which grow out of this commerce. Had this action remained in the state court in which it was originally brought, the court would have had jurisdiction to hear and determine the issues between the parties, because Congress had not enacted that jurisdiction over cases of this character is confined exclusively to the courts of the United States, and therefore the jurisdiction of the state court was full and complete."

**§ 878. Procedure Controlled by State Rules.** As all suits for penalties under the Safety Appliance Act are civil actions, and as the federal statute provides that, as to matters of practice and pleading, the courts of the United States shall conform as near as may be to the procedure in the state courts, the sufficiency of a petition for a penalty must be determined by the law of

the state where the court is in session.<sup>6</sup> Thus, in a district court for the eastern district of North Carolina, it was held that a petition alleging a violation "on or about" a particular date, was sufficient as the courts of the state in former decisions had so held.<sup>7</sup>

**§ 879. Petition In Personal Injury Cases Need Specifically Refer to Statute.** In the personal injury actions for violation of the statute, it was not necessary, in order to base a right of recovery thereon, for the plaintiff to cite the statute or to expressly invoke its terms. The petition need not state in so many words that the action is brought under the statute. If the plaintiff in his petition alleges that the defendant was a common carrier by railroad engaged in interstate commerce and states facts which show that the car in question was defective within the meaning of the act and that it was used on the railroad, then the statute applies without any reference to it.<sup>8</sup>

**§ 880. Plaintiff Not Required to Negative Provisos.** In both actions for penalties and for personal injuries, the plaintiff is not required to negative the provisos of the statute in the petition, for the general rule is that provisos carve special exceptions from the body of the act. If the defendant desires to bring itself within the terms of the statutory exceptions, it must plead the facts as an affirmative defense and the burden is upon it to sustain such allegations.<sup>9</sup>

6. *United States v. Atlantic Coast Line R. Co.*, 141 N. C. 171,

7. *Lumber Co. v. Atlantic Coast Line R. Co.*, 141 N. C. 171, 53 S. E. 823; See also *Louisville & N. R. Co. v. United States*, 108 C. C. A. 326, 186 Fed. 280.

8. *Garrett v. Louisville & N. R. Co.*, 235 U. S. 308, 59 L. Ed. 242, 35 Sup. Ct. 32; *Grand Trunk Western R. Co. v. Lindsay*, 233 U. S. 42, 58 L. Ed. 838, 34 Sup.

Ct. 581, Ann. Cas. 1914C 168; *Kelly's Adm'x. v. Chesapeake & O. Ry. Co.*, 201 Fed. 602; *Voelker v. Chicago, M. & St. P. Ry. Co.*, 116 Fed. 867; *Missouri Pac. R. Co. v. Brinkmeier*, 77 Kan. 14, 93 Pac. 621; *Allen v. Tuscarora Valley R. Co.*, 229 Pa. 97, 30 L. R. A. (N. S.) 1096, 140 Am. St. Rep. 714, 78 Atl. 34.

9. *Schlemmer v. Buffalo, R. & P. R. Co.*, 205 U. S. 1, 51 L. Ed.



§ 881. **Allegation As to Use of Car in Moving Interstate Traffic.** Under the original act of 1893, in a personal injury action, a petition which did not contain an allegation that the defective car was used in moving interstate traffic was fatally defective even though it was alleged that the defendant was a common carrier by railroad engaged in interstate commerce.<sup>10</sup> But since the 1903 amendment extended the provisions of the Act to all cars used on any railroad engaged in interstate commerce, such an allegation is not now necessary.

§ 882. **Submitting Case under Safety Appliance Act Without Allegation of Interstate Employment not Error, When.** Under a petition in a personal injury action stating a cause of action solely under a state law requiring automatic couplers, the submission of the cause to the jury under the Federal Safety Appliance Act is not error where the objection thereto is made for the first time in the appellate court.<sup>11</sup> Thus, in the Voelker case, cited, a personal injury action, the plaintiff based his petition upon an Iowa statute requiring couplers. Without objection, proof was introduced showing that the defendant was engaged in interstate commerce and that the car with a defective appliance was used in moving interstate traffic. The

681, 27 Sup. Ct. 407; *United States v. Trinity & B. V. R. Co.*, 128 C. C. A. 120, 211 Fed. 448; *United States v. Houston Belt & Terminal R. Co.*, 125 C. C. A. 481, 205 Fed. 344; *United States v. Kansas City Southern R. Co.*, 121 C. C. A. 136, 202 Fed. 828; *Chicago, B. & Q. R. Co. v. United States*, 115 C. C. A. 193, 195 Fed. 241; *United States v. Kansas City Southern Ry. Co.*, 189 Fed. 471; *United States v. Atlantic Coast Line R. Co.*, 153 Fed. 918.

10. *Brinkmeier v. Missouri Pac. R. Co.*, 224 U. S. 268, 56 L. Ed.

758, 32 Sup. Ct. 412. Said the court: "The Supreme court of the state held that in the absence of such an allegation the petition did not state a cause of action under the original act. We think that ruling was right. The terms of that act were such that its application depended, first, upon, the carrier being engaged in interstate commerce by railroad, and, second, upon the use of the car in moving interstate traffic".

11. *Chicago, M. & St. P. R. Co. v. Voelker*, 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264.

cause of action arose before the 1903 amendment extending the act to intrastate cars. Instructions were also given submitting the cause to the jury under the Federal Act. On writ of error it was held that the plaintiff was entitled to be reasonably apprised of the objection so that, if he so desired, he could have amended his petition in the trial court and objection on appeal was too late. Similar rulings have been made in personal injury actions under the Federal Employers' Liability Act.<sup>12</sup>

**§ 883. Judicial Notice of Orders of Commission Under Safety Appliance Act.** Whenever by an act of Congress power is intrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance to such authority become a mass of that body of public records of which the court will take judicial notice.<sup>13</sup> But it has been held that the courts will not take judicial notice of the orders of the Interstate Commerce Commission pursuant to the authority delegated to it in the Safety Appliance Act.<sup>14</sup>

**§ 884. Federal Statute of Limitation Controls When Employe is Engaged in Interstate Commerce.** If an employe of a common carrier by railroad, injured or killed because of defective appliances in violation of the Safety Appliance Act, was at the time of the injury or death, engaged in interstate commerce, then the statute of limitation governing is the Federal Em-

12. Illinois Cent. R. Co. v. Nelson, 128 C. C. A. 525, 212 Fed. 69; Bradbury v. Chicago, R. I. & P. R. Co., 149 Iowa 51, 40 L. R. A. (N. S.) 684, 128 N. W. 1; Flemming v. Norfolk Southern R. Co., 160 N. C. 196, 76 S. E. 212; Erie R. Co. v. Welsh, 89 Ohio St. 81, 105 N. E. 189.

13. Caha v. United States, 152 U. S. 211, 38 L. Ed. 415, 14 Sup. Ct. 513; Jenkins v. Collard, 145 U. S. 546, 36 L. Ed. 812, 12 Sup. Ct. 868; Knight v. United States Land Ass'n, 142 U. S. 161, 35 L. Ed. 974, 12 Sup. Ct. 258.

14. Christy v. Wabash R. Co., 195 Mo. App. 232, 191 S. W. 241.

ployers' Liability Act, which by Section 6 provides that no action shall be maintained under this act unless commenced within two years from the date the cause of action accrued. As to all interstate employes, the Federal Employers' Liability Act is exclusive and supersedes all state laws. Its provision, therefore, governs all actions by employes injured through violations of the Safety Appliance Act and while engaged in interstate commerce.

**§ 885. State Statute of Limitation Controls in Absence of Interstate Employment.** If, however, an employe, injured by reason of failure to comply with the Safety Appliance Act, was not at the time engaged in interstate commerce, then the limitation of the cause of action is governed solely by the laws of the state where the casualty occurred;<sup>15</sup> for if a cause of action is one created by a Federal statute, the rule of limitation is controlled by the statute of a state in the absence of any general Federal statute of limitation or in the absence of any specific limitation in the statute creating the cause of action.<sup>16</sup> Prior to the enactment of the Federal Employers' Liability Act, the law of the state as to limitation controlled in all cases for personal injuries due to violations of the act, but as the Federal Employers' Liability Act specifically determines the limitation of the cause of action as to interstate employes only, the state law still controls as to employes not engaged in interstate commerce.

**§ 886. Effect of Amendment Stating a New Cause of Action After Statute has Run.** An amendment to a petition after the period of limitation has run which, for the first time, states a cause of action under the Safety Appliance Act, is not permissible. Thus, in a personal injury action by a brakeman who was injured

15. *Nichols v. Chesapeake & O. R. Co.*, 115 C. C. A. 601, 195 Fed. 913.

16. *Campbell v. City of Haverhill*, 155 U. S. 610, 39 L. Ed. 280, 15 Sup. Ct. 217.

in coupling two cars, it was alleged that the defendant was a common carrier engaged in interstate commerce by railroad and that the cars in question were not equipped with couplers of the prescribed type and that the plaintiff's injury proximately resulted therefrom, but there was no allegation that either of the cars was then or at any time used in moving interstate traffic. After the period of limitation under the laws of Kansas had expired, the plaintiff amended his petition by alleging that the cars were used in moving interstate commerce. The court held that the amendment so made after the period of limitation had expired, came too late.<sup>17</sup> It should be noted, however, that this decision was dealing with facts occurring before the amendment of 1903 which eliminated the requirement as to the use of a car in moving interstate traffic.

17. *Brinkmeier v. Missouri Pac. R. Co.*, 224 U. S. 268, 56 L. Ed. 758, 32 Sup. Ct. 412.

## CHAPTER L.

### ACTION FOR PENALTIES.

- Sec. 887. In Prosecutions for Penalty, Carrier Liable as to Each Car Hauled in Violation of Statute.
- Sec. 888. Appropriate Remedy for Recovery of Statutory Penalty.
- Sec. 889. Proceedings for Penalties Not Criminal Actions.
- Sec. 890. Burden and Quantum of Proof in Actions for Penalties.
- Sec. 891. Preponderance of the Evidence Defined.

**§ 887. In Prosecutions for Penalty, Carrier Liable as to Each Car Hauled in Violation of Statute.** Each and every car hauled or used by a common carrier is a violation of the statute which entitles the government to recover a penalty of One Hundred Dollars. This is true although several defective cars are hauled in one train. Each car constitutes a distinct violation.<sup>1</sup>

**§ 888. Appropriate Remedy for Recovery of Statutory Penalty.** A civil action in the nature of an action for a debt is appropriate for the recovery of the penalties imposed by the Safety Appliance Act.<sup>2</sup>

**§ 889. Proceedings for Penalties Not Criminal Actions.** An action by the government for a penalty for a violation of the Safety Appliance Act is not a

1. *United States v. St. Louis, Southwestern R. Co. of Texas*, 106 C. C. A. 230, 184 Fed. 28; *St. Louis Southwestern R. Co. v. United States*, 106 C. C. A. 136, 183 Fed. 770.

2. *Chicago, B. & Q. R. Co. v. United States*, 95 C. C. A. 642, 170 Fed. 556; *United States v. Illinois Cent. R. Co.*, 95 C. C. A. 628, 170 Fed. 542; *Atlantic Coast Line R. Co. v. United States*, 94 C. C. A. 35, 168 Fed. 175; *Wabash R. Co. v. United States* 93 C. C. A. 393, 168 Fed. 1; *United States v.*

*Southern Pac. Co.*, 167 Fed. 699; *United States v. Louisville & N. R. Co.*, 93 C. C. A. 58, 167 Fed. 306; *United States v. Illinois Cent. R. Co.*, 166 Fed. 997; *United States v. Chicago Great Western Ry. Co.* 162 Fed. 775; *United States v. Philadelphia & R. Ry. Co.*, 162 Fed. 403; *United States v. Baltimore & O. S. W. R. Co.*, 86 C. C. A. 223, 159 Fed. 33; *United States v. Atlantic Coast Line R. Co.*, 153 Fed. 918; *United States v. Chicago P. & St. L. Ry. Co. et al.*, 143 Fed. 353.

criminal prosecution but is a civil one;<sup>3</sup> for it is a settled law that a certain sum, or a sum which can readily be reduced to a certainty, prescribed in a statute as a penalty for the violation of a law, may be recovered in a civil action.<sup>4</sup> If the evidence in an action for penalty is uncontradicted and raises only a question of law, the court may withdraw the case from the jury and direct a verdict.<sup>5</sup>

**§ 890. Burden and Quantum of Proof in Actions for Penalties.** In all actions for penalties for violating the statute, the burden of proof is upon the government to show that the defendant, at the time of the alleged offense, was a common carrier by railroad engaged in interstate commerce and that the train or cars were used on its line, and that they were not equipped with the devices or appliances required by the statute or the orders of the Interstate Commerce Commission made pursuant thereto.<sup>6</sup> Formerly it was held that the government must prove its case beyond a reasonable doubt,<sup>7</sup> but the courts are now unanimous of the opinion that the rule in civil cases requiring merely proof by a preponderance of the evidence is sufficient to establish the allegations of the petition.<sup>8</sup>

3. *Chicago, B. & Q. Ry. Co. v. United States*, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582; *Contra: United States v. Illinois Cent. R. Co.*, 156 Fed. 182.

4. *Hepner v United States*, 213 U. S. 103, 53 L. Ed. 720, 29 Sup. Ct. 474, 27 L. R. A. (N. S.) 739, 16 Ann. Cas. 960.

5. *Chicago, B. & Q. Ry. Co. v. United States*, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582.

6. *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 559, 55 L. Ed. 582, 31 Sup. Ct. 612; *United States v. Montpelier & W. R. R.* 175 Fed. 874, *United States v. Southern Ry. Co.*, 170 Fed. 1014; *United States v. Illinois Cent. R.*

*Co.*, 166 Fed. 997; *United States v. Chicago Great Western Ry. Co.*, 162 Fed. 775; *United States v. Louisville & N. R. Co.*, 162 Fed. 185; *United States v. Central of Georgia Ry. Co.*, 157 Fed. 893.

7. *United States v. Illinois Cent. R. Co.*, 156 Fed. 182.

8. *Wheeling Terminal R. Co. v. Russell*, 126 C. C. A. 519, 209 Fed. 795; *United States v. St. Louis Southwestern R. Co. of Texas*, 106 C. C. A. 230, 184 Fed. 28; *United States v. Baltimore & O. R. Co.*, 176 Fed. 114; *United States v. Montpelier & W. R. R.* 175 Fed. 874; *United States v. Southern Ry. Co.*, 170 Fed. 1014; *United States v. Boston & M. R.*

**§ 891. Preponderance of the Evidence Defined.**

The term "preponderance of the evidence" in actions for penalties has been defined in instructions to juries as follows: "By the preponderance of the evidence, you are not to understand that the government must make out its case beyond a reasonable doubt. It is sufficient that you are satisfied in your own mind from all the evidence that the defendant did the act complained of."<sup>9</sup> In another case it was defined as follows: "A preponderance of the evidence is sufficient; and what does that mean? It means that after balancing and considering the evidence on the one side and on the other, you are not left in doubt, but that you find that the evidence for the government outweighs the evidence brought here to meet it."<sup>10</sup>

Co., 168 Fed. 148; United States v. Atchison T. & S. F. Ry. Co., 167 Fed. 696; United States v. Nevada County Narrow Gauge R. Co., 167 Fed. 695; United v. Chicago Great Western Ry. Co., 162 Fed. 775; United States v. Phila-

delphia & R. Ry. Co. 160 Fed. 696.

9. United States v. Central of Georgia Ry. Co., 157 Fed. 893.

10. United States v. Boston & M. R. Co., 168 Fed. 148.





## PART FIVE

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### MISCELLANEOUS FEDERAL LAWS REGULATING INTERSTATE CARRIERS

**HOURS OF SERVICE ACT.**

**28-HOUR LIVE STOCK LAW.**

**BOILER INSPECTION ACT.**

**ASH PAN ACT.**

**ACCIDENT REPORTS ACT.**

**ADAMSON LAW.**



## CHAPTER LI.

### FEDERAL HOURS OF SERVICE ACT.

#### **A. Purpose, Scope, Validity and Interpretation of Act.**

- Sec. 892. State and Federal Control over Hours of Labor of Employees of Interstate Carriers.
- Sec. 893. Carriers and Employees Subject to the Hours of Service Act.
- Sec. 894. Constitutionality of the Hours of Service Act Affirmed.
- Sec. 895. Statute not Void for Uncertainty.
- Sec. 896. Classification of Operators in Section 2 of Statute does not Render Statute Invalid.
- Sec. 897. Power of Commission to Require Monthly Reports by Carriers Showing Violations of Statute.
- Sec. 898. Purpose of Congress in the Enactment of the Hours of Service Act.
- Sec. 899. The Statute, being Remedial, should be Liberally Construed.
- Sec. 900. Term "Railroad" as Used in the Act Defined.
- Sec. 901. Penalties for Violation of Statute—Procedure and Duty of Interstate Commerce Commission.
- Sec. 902. Separate Penalty Incurred for each Employee Kept on Duty Beyond Statutory Period Though Due to Same Cause.
- Sec. 903. Statute may not be Evaded by Requiring Service of Another Kind after Statutory Period.

#### **B. Limitations Upon Hours of Service.**

- Sec. 904. Limitation upon the Hours of Service of Employees Engaged in or Connected with Movement of Trains.
- Sec. 905. When an Employee is "on Duty"—Commencement and Termination of Service.
- Sec. 906. Effect of Brief Periods off Duty in Breaking Continuity of Service.
- Sec. 907. Release from Duty for Definite Period of Two Consecutive Hours.
- Sec. 908. Duty to Substitute Relief Crews at Intermediate Terminals to Prevent Excessive Hours.
- Sec. 909. Fireman Engaged in Watching an Engine on Duty Within Meaning of Statute.
- Sec. 910. Limitation upon the Hours of Service of Employees Handling Orders Affecting Train Movements.
- Sec. 911. Applicability of Operators' Proviso to Tower Men and Switch Tenders in Railroad Yards—Conflicting Rulings.
- Sec. 912. Hours of Service in Telegraph Offices Operated During Day and Part of Night.
- Sec. 913. Separate Periods of Service for Operators not Exceeding Total of Nine Hours in Twenty-four Hours, not unlawful.

Sec. 914. Two Telegraph Offices in One Community Constitute One "Place" Within Statute, When.

**C. Statutory Exceptions and Excuses.**

Sec. 915. When Provisions of Statute Limiting Hours of Service are not Applicable.

Sec. 916. Terms "Casualty," "Unavoidable Accident" and "Act of God" as Used in Section 3 Defined.

Sec. 917. High Degree of Diligence Required to Bring Carrier Within Statutory Exceptions.

Sec. 918. Derailments and Collisions of Trains Constitute "Casualties" within Meaning of Exemption Clause.

Sec. 919. Ordinary Delays Incident to Train Operation not Valid Excuses.

Sec. 920. What Constitutes an Emergency Within Operators' Proviso of Section 2.

Sec. 921. Insubordination of Employee may Constitute "Emergency" Within Section 2.

Sec. 922. Burden of Proving Excessive Service to be Within Statutory Exception is Upon Carrier.

**A. Purpose, Scope, Validity and Interpretation of Act.**

§ 892. **State and Federal Control over Hours of Labor of Employees of Interstate Carriers.** In promoting the safety of employes and travelers in interstate commerce, Congress is not limited to the enactment of laws relating to the mechanical appliances as exemplified in the passage of the Safety Appliance Act and its amendments. Legislative restrictions upon the hours of labor of employes who are connected with the movement of trains in interstate transportation has direct relation to the efficiency of the human agencies upon which protection to life and property in interstate commerce necessarily depends, and are, therefore, within the protective power of Congress under the commerce clause.<sup>1</sup> The subject matter of the hours of labor of railroad employes is, however, of that local character which the states, in the absence of national legislation, may control.<sup>2</sup> Since the enactment of the federal Hours

1. *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. Ed. 878, 31 Sup. Ct. 621.

2. *Erie R. Co. v. New York*,

233 U. S. 671, 58 L. Ed. 1149, 34 Sup. Ct. 756, 52 L. R. A. (N. S.) 266, Ann. Cas. 1915D 138; *North-eastern Pac. R. Co. v. State ex rel. Atkinson*, 222 U. S. 370, 56 L. Ed.

of Service Act,<sup>3</sup> state laws regulating hours of service of interstate employes have been superseded.\* “The reasoning of the opinion and the decision,” said Mr. Justice McKenna,<sup>5</sup> “oppose the contention of defendant in error and of the Court of Appeals, that the state law and the Federal law can stand together, because, as expressed by the Court of Appeals, ‘the State has simply supplemented the action of the Federal authorities,’ and, on account of special conditions prevailing within its limits, has raised the limit of safety; and the form of the Federal statute, although ‘not expressly legalizing employment up to that limit, fairly seems to have invited and to have left the subject open for supplemental state legislation if necessary.’ We realize the strength of these observations, but they put out of view, we think, the ground of decision of the cases, and, indeed, the necessary condition of the supremacy of the congressional power. It is not that there may be division of the field of regulation, but an exclusive occupation of it when Congress manifests a purpose to enter it. Regulation is not intended to be a mere wanton exercise of power. It is a restriction upon the management of the railroads. It is induced by the public interest or safety, and the ‘Hours of Service’ law of March 4, 1907, is the judgment of Congress of the extent of the restriction necessary. It admits of no supplement; it is the prescribed measure of what is necessary and

237, 32 Sup. Ct. 160.

“It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a State to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive

power.” *Northern Pac. R. Co. v. Washington*, *supra*.

3. 34 Stat. at L. 1415, Appendix I, *infra*.

4. *State v. Missouri Pac. R. Co.*, 212 Mo. 658, 111 S. W. 500; *State v. Chicago, M. & St. P. R. Co.*, 136 Wis. 407, 19 L. R. A. (N. S.) 326, 117 N. W. 686.

5. *Erie R. Co. v. New York*, 233 U. S. 671, 58 L. Ed. 1149, 34 Sup. Ct. 756, 52 L. R. A. (N. S.) 266, Ann. Cas. 1915D 138.

sufficient for the public safety and of the cost and burden which the railroad must endure to secure it."

**§ 893. Carriers and Employes Subject to the Hours of Service Act.** The provisions of the federal Hours of Service Act apply to all common carriers engaged in the transportation of passengers or property by railroad in the District of Columbia or any territory of the United States, or from one state or territory of the United States or the District of Columbia, to any other state or territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States." The act also applies to all officers, agents and employes of such carriers actually engaged in or connected with the movement of any train carrying passengers or property in the District of Columbia, or any territory of the United States,

6. Section 1 of the Hours of Service Act 34 Stat. at L. 1415, Appendix I, *infra*; Brooklyn Eastern Dist. Terminal v. United States, 152 C. C. A. 275, 239 Fed. 287, 15 N. C. C. A. 325.

"Congress, in passing the act in question, must have intended to use the term 'common carrier' in the usual and ordinary acception of the term, towit, as one engaged in the business of carrying persons and property from one place to another, for compensation, for all who should apply to have their goods transported or to be transported in person. The mere fact that the statute in question is a penal one does not require that the words 'common carrier' should receive a restricted interpretation. \* \* \* From a consideration of the foregoing authorities, it seems to us clear that the term

'common carriers' had a well-defined meaning, and that the receiver of a railroad came within the designation 'common carrier'; that Congress, in using the term 'common carrier,' used it in the sense in which such words are generally meant and understood." United States v. Ramsey, 116 C. C. A. 568, 197 Fed. 144.

"The provisions of this act apply to all common carriers by railroad in the District of Columbia, or in any Territory of the United States, or engaged in the movement of interstate or foreign traffic; and to all employes of such common carriers who are engaged in or connected with the movement of any train carrying traffic in the District of Columbia or in any territory, or carrying interstate or foreign traffic." Conf. Ruling No. 287a, Appendix, I, *infra*.

or from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States, through a foreign country to any other place in the United States. Train dispatchers, conductors, engineers, firemen, brakemen, telegraphers, yard men, switch tenders, tower men, block signal operators, and train baggage men who are employes of the railway company and who are required by the rules of the company to preform or to hold themselves in readiness when called upon to perform any duty connected with the movement of any train, are within the provisions of the statute;<sup>7</sup>

7. *Chicago & A. R. Co. v. United States*, 157 C. C. A. 295, 244 Fed. 945; *United States v. Missouri Pac. R. Co.*, 156 C. C. A. 466, 244 Fed. 38; *Atchison, T. & S. F. R. Co. v. United States*, 155 C. C. A. 644, 243 Fed. 114; *United States v. Pennsylvania R. Co.*, 239 Fed. 576; *Brooklyn Eastern Dist. Terminal v. United States*, 152 C. C. A. 275, 239 Fed. 287, 15 N. C. C. A. 325; *Denver & I. R. Co. v. United States*, 150 C. C. A. 17, 236 Fed. 685; *St. Joseph & G. I. R. Co. v. United States*, 146 C. C. A. 397, 232 Fed. 349; *Chicago & N. W. R. Co. v. United States*, 141 C. C. A. 138, 226 Fed. 30; *Chicago, R. I. & P. R. Co. v. United States*, 141 C. C. A. 135, 226 Fed. 27; *United States v. Grand Rapids & I. R. Co.*, 140 C. C. A. 177, 224 Fed. 667; *Oregon-Washington R. & Nav. Co. v. United States*, 139 C. C. A. 142, 223 Fed. 596; *United States v. Florida East Coast R. Co.*, 137 C. C. A. 571, 222 Fed. 33; *United States v. Chicago, M. & St. P. R. Co.*, 219 Fed. 1011; *United States v. Chicago, M. & P. S. Ry. Co.*, 218 Fed. 701;

*Schweig v. Chicago, M. & St. P. R. Co.*, 132 C. C. A. 660, 216 Fed. 750, 7 N. C. C. A. 135; *San Pedro, L. A. & S. L. R. Co. v. United States*, 130 C. C. A. 28, 213 Fed. 326; *United States v. Atlantic Coast Line R. Co.*, 128 C. C. A. 275, 211 Fed. 897; *Missouri Pac. R. Co. v. United States*, 128 C. C. A. 271, 211 Fed. 893; *Great Northern R. Co. v. United States*, 127 C. C. A. 595, 211 Fed. 309; *United States v. Missouri Pac. Ry. Co.*, 206 Fed. 847; *United States v. Great Northern Ry. Co.*, 206 Fed. 838; *United States v. Houston Belt & Terminal R. Co.*, 125 C. C. A. 481, 205 Fed. 344; *United States v. Chicago, M. & P. S. Ry. Co.*, 197 Fed. 624; *Atchison, T. & S. F. R. Co. v. United States*, 100 C. C. A. 534, 177 Fed. 114; *State v. Chicago, M. & St. P. R. Co.*, 136 Wis. 407, 19 L. R. A. (N. S.) 326; 117 N. W. 686.

"We are not now to consider whether Schweig was engaged in interstate commerce, for that is admitted; but the question is, Was he actually engaged in or

but the statute does not apply to employes on a ferry even when owned by a railroad company because the law applies to employes connected with the movement of trains, and, hence, does not embrace employes engaged only in the operation of a ferry.<sup>8</sup> In a leading case,<sup>9</sup> the scope of the act was thus construed: "No difficulty arises in the construction of this language. The first sentence states the application to carriers and employes who are 'engaged in the transportation of passengers or property by railroad' in the District of Columbia or the Territories, or in interstate or foreign commerce. The definition in the second sentence, of what the terms 'railroad' and 'employes' shall include, qualify these words as previously used, but do not remove the limitation as to the nature of the transportation in which the employes must be engaged in order to come within the provisions of the statute. If the definition, in the last part of the sentence, of the words used in the first part be read in connection with the latter the meaning of the whole becomes obvious. The section, in effect, thus provides: 'This act shall apply to any common carrier or carriers, their officers, agents, and employes (meaning by 'employes' persons actually engaged in or connected with the movement of any train), engaged in the transportation of passengers or property by railroad (meaning by 'railroad' to include all bridges and ferries used or operated in connection with any railroad) in the District of Columbia or any Territory . . . or from one State . . . to any other State,' etc. In short, the employes to

connected with the movement of any train? In riding upon the engine, Schweig and the other employes had nothing to do with its operation or movement. Their work was entirely independent of this, and it seems clear that in performing the work, which the record shows that Schweig performed, he was neither within the spirit or the letter of the Hours

of Service Act. He was neither engaged in nor connected with the movement of the train." *Schweig v. Chicago, M. & St. P. R. Co.*, *supra*.

8. Conf. Rulings Nos. 108 and 287.

9. *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. Ed. 878, 31 Sup. Ct. 621.



which the act refers, embracing the persons described in the last sentence of the section, are those engaged in the transportation of passengers or property by railroad in the district, territorial, interstate or foreign commerce defined; and the railroad, including bridges and ferries, is the railroad by means of which the defined commerce is conducted."

**§ 894. Constitutionality of the Hours of Service Act Affirmed.** In *Baltimore & O. R. Co. v. Interstate Commerce Commission*,<sup>10</sup> the carriers contended that the federal Hours of Service Act was unconstitutional in its entirety for the reason that its provisions extended beyond the power which Congress might lawfully exercise in the regulation of interstate commerce in that it applied to intrastate railroads and to employees engaged in local business. In rejecting this view concerning the statute, and affirming its validity under the commerce clause, Mr. Justice Hughes, for the court, said: "The statute, therefore, in its scope, is materially different from the act of June 11, 1906, chapter 3073, 34 Stat. 232, which was before this court in the *Employers' Liability Cases*, 207 U. S. 463. There, while the carriers described were those engaged in the commerce subject to the regulating power of Congress, it appeared that if a carrier was so engaged the act governed its relation to every employe, although the employment of the latter might have nothing whatever to do with interstate commerce. In the present statute, the limiting words govern the employes as well as the carriers. But the argument, undoubtedly, involves the consideration that the interstate and intrastate operations of interstate carriers are so interwoven that it is utterly impracticable for them to divide their employes in such manner that the duties of those who are engaged in connection with interstate commerce shall be confined to that commerce exclusively. And thus, many employes who have to do with the movement of trains in interstate transportation are, by virtue of practical

10. 221 U. S. 612, 55 L. Ed. 878, 31 Sup. Ct. 621.

necessity, also employed in intrastate transportation. This consideration, however, lends no support to the contention that the statute is invalid. For there cannot be denied to Congress the effective exercise of its constitutional authority. By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce and of those who are employed in transporting them. *Johnson v. Southern Pacific Company*, 196 U. S. 1; *Adair v. United States*, 208 U. S. 177, 178; *St Louis, I. M. & S. Railway Company v. Taylor*, 210 U. S. 281; *Chicago, Burlington & Quincy Railroad Company v. United States*, decided May 15, 1911, 220 U. S. 559. The fundamental question here is whether a restriction upon the hours of labor of employes who are connected with the movement of trains in interstate transportation is comprehended within this sphere of authorized legislation. This question admits of but one answer. The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of employes and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers, and other persons embraced within the class defined by the act. And in imposing restrictions having reasonable relation to this end there is no interference with liberty of contract as guaranteed by the constitution. *Chicago, Burlington & Quincy Railroad Company v. McGuire*, 219 U. S. 549. If then it be assumed, as it must be, that in the furtherance of its purpose Congress can limit the hours of labor of employes engaged in interstate transportation, it follows that this power cannot be defeated either by prolonging

the period of service through other requirements of the carriers or by the commingling of duties relating to interstate and intrastate operations."

**§ 895. Statute not Void for Uncertainty.** It was also urged by the carriers in the Baltimore & Ohio case that the statute was void for uncertainty, because the words "as to any case of emergency," found in the operators' proviso in section 2, made the application of the statute so uncertain as to destroy its validity. "But this argument," said the court, "in substance denies to the legislature the power to use a generic description, and if pressed to its logical conclusion would practically nullify the legislative authority by making it essential that legislation should define, without the use of generic terms, all the specific instances to be brought within it. In a legal sense there is no uncertainty. Congress, by an appropriate description of an exceptional class, has established a standard with respect to which cases that arise must be adjudged. Nor does the contention gather strength from the broad scope of the proviso in sec. 3, for if the latter, in limiting the effect of the entire act, could be said to include everything that may be embraced within the term 'emergency' as used in sec. 2, this would be merely a duplication which would not invalidate the act."

**§ 896. Classification of Operators in Section 2 of Statute does not Render Statute Invalid.** The classification of operators prescribed in section 2 of the Hours of Service Act is not unreasonable and arbitrary so as to render that part of the statute void.<sup>11</sup> "It is insisted by counsel for the defendant that the classification of the telegraph operators is arbitrary, rendering the act void, since it discriminates between operators engaged in stations that are 'continuously operated night and day' and those employed in stations that are 'continuously operated only during the daytime.' Just

11. *United States v. St. Louis Southwestern Ry. Co. of Texas*, 189 Fed. 954.

why the classification is unconstitutional it is difficult for the court to conceive. And it is still more strange that the Supreme Court in construing the act in its entirety should have overlooked what counsel appear to regard as so vital an objection to its constitutionality. The proviso, referring to operators, train dispatchers, etc., was considered by the court, and there is no intimation in the opinion that the classification is either unjust or arbitrary. Where Congress has power to legislate in preference to the hours of labor of employes, no hard and fast rule of classification may for all cases be prescribed. Thus it was said by the court in *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 296, 18 Sup. Ct. 599, 42 L. Ed. 1037: 'There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things.' The objection of counsel that the classification in the act provided is unreasonable and arbitrary, and therefore void, is untenable."

**§ 897. Power of Commission to Require Monthly Reports by Carriers Showing Violations of Statute.** It is the duty of the Interstate Commerce Commission to execute and enforce the provisions of the Hours of Service Act, and all powers granted to the Commission are extended to it in the execution of the act.<sup>12</sup> Shortly after the effective date of the statute, the Commission made an order requiring all carriers subject to the statute, to make monthly reports, under oath, showing each instance where an employe subject to the act had been on duty for a longer period than that allowed by the statute. In sustaining the validity of this order as against numerous objections, the federal Supreme Court said: "We are brought to the question whether the Interstate Commerce Commission has authority to require the reports called for by its order. Section 4 of

12. Section 4 of the Hours of Service Act, Appendix I, *infra*.

the act provides: 'Sec. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this Act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this Act.' The Commission then may call to its aid in the enforcement of the act 'all powers granted' to it. And, although there might have been doubt, as to the adequacy of the authority of the Commission, under the law as it formerly stood, to require these reports, there can be none now in view of the amendment of sec. 20 of the act to regulate commerce by the act of June 18, 1910, c. 309, 36 Stat. 556. As so amended, this section contains the following provision: 'The commission shall also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the commission is authorized or required by this or any other law to inquire or keep itself informed or which it is required to enforce; and such periodical or special reports shall be under oath whenever the commission so requires.' This clearly embraces the power which the Commission here asserts, and it is certainly now entitled to promulgate an order requiring reports to be made. It follows that as, under the stipulation of record here, the requirement of the Commission is to operate wholly in the future and it has been suspended awaiting the final determination of this cause, the question of the authority of the Commission at the time the order was made has become a moot one. Were there no other question before us the appeal would accordingly be dismissed, and to justify a reversal of the judgment and the sustaining of the complainant's bill other grounds must appear. Nor can it be said, so far as the scope of the requirement of the order is concerned, that it goes beyond the authority which has been conferred upon the Commission. The order relates to the employees who are 'subject to said act.' The bill alleges that, in the original forms prescribed, the carrier was required to show the employees

who were 'either on duty for a period of time in excess of that contemplated by the act or who had not been off duty after any period of service for the length of time prescribed by the act, and in the case of every such employe the carrier was required to state the cause of and the facts, if any, explanatory of the excess service thus rendered by the employe.' By the amended instructions set forth in the stipulation, it appears that 'in case no employe has been employed in excess of the time named in said act, and in case no employe has gone on duty with less than the statutory period off duty,' a separate form of oath to that effect will be accepted in lieu of the forms which are to be used in detailing excess service. And, as already noted, the reports are to be made by the secretary or similar officer. To enable the Commission properly to perform its duty to enforce the law, it is necessary that it should have full information as to the hours of service exacted of the employes who are subject to the provisions of the statute, and the requirements to which we have referred are appropriate for that purpose and are comprehended within the power of the Commission.'<sup>13</sup>

**§ 898. Purpose of Congress in the Enactment of the Hours of Service Act.** The purpose of Congress in the enactment of the Hours of Service Act was to prevent the dangers which must necessarily arise to employes and to the public from continuing men in a dangerous and hazardous business for periods so long as to render them unfit to give that service which is essential to the protection of themselves and those intrusted to their care; for it is common knowledge that the passage of this statute was induced by reason of the many casualties in railroad transportation which resulted from requiring tired and exhausted employes to discharge the arduous duties of their employment.<sup>14</sup>

13. *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. Ed. 878, 31 Sup. Ct. 621.

14. *Atchison, T. & S. F. R. Co. v. United States*, 244 U. S. 336, 61 L. Ed. 1175, 37 Sup. Ct. 635.

The statute recognizes that there is a limit to human endurance and that hours of rest and recreation are needed for the health and the efficiency of men engaged in railroading.<sup>15</sup> "In this legislation," said Judge Hook, "Congress had in view the many serious railroad accidents caused by the unfitness for duty of men, engaged in or having to do with the movements of trains, who had endured excessive periods of continuous, unbroken service without intervals for rest. The remedy adopted was by limiting the maximum of the hours of service and the minimum for the intervals between. It was thought futile to attempt to control the employes in their use of their off time; therefore, as being more practical and efficient, the command was laid upon and confined to those who gave them employment in their regular occupations."<sup>16</sup>

**§ 899. The Statute, being Remedial, should be Liberally Construed.** The Hours of Service Act is a highly remedial statute, and although a penalty is provided for its violation, it should be liberally construed in order that its purpose may be effected; for the public as well as the employes themselves are vitally interested in its enforcement.<sup>17</sup> As the purpose of the statute is to prevent accidents to trains and consequent injuries to passengers and employes, it is the duty of the courts to construe it liberally in order to accomplish the purpose of its enactment.<sup>18</sup> "The act is remedial and in the public interest, and should be construed in the light of its humane purpose."<sup>19</sup>

15. *United States v. Atlantic Coast Line R. Co.*, 128 C. C. A. 275, 211 Fed. 897; *United States v. Yazoo & M. V. R. Co.*, 203 Fed. 159.

16. *San Pedro, L. A. & S. L. R. Co. v. United States*, 130 C. C. A. 28, 213 Fed. 326.

17. *United States v. St. Louis Southwestern Ry. Co. of Texas*,

189 Fed. 954; *United States v. Kansas City Southern R. Co.*, 121 C. C. A. 136, 202 Fed. 828.

18. *United States v. Kansas City Southern Ry. Co.*, 189 Fed. 471.

19. *Atchison, T. & S. F. R. Co. v. United States*, 244 U. S. 336, 61 L. Ed. 1175, 37 Sup. Ct. 635.

**§ 900. Term "Railroad" as Used in the Act Defined.** The Hours of Service Act applies only to common carriers who are engaged in interstate commerce by railroad. The statute defines the term "railroad" as including all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating the railroad, whether owned or operated under a contract, agreement, or lease.<sup>20</sup>

**§ 901. Penalties for Violation of Statute—Procedure and Duty of Interstate Commerce Commission.** Section 3 of the Act, as amended in 1916,<sup>21</sup> prescribes that any common carrier, or officer or agent thereof subject to the act, requiring or permitting any employee to go, be, or remain on duty in violation of the second section of the act, shall be liable to a penalty of not less than \$100 nor more than \$500 for each and every violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed. The statute declares it to be the duty of such district attorney to bring such suit upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation. The Interstate Commerce Commission is required to lodge with the proper district attorney information of any such violations as may come to its knowledge.<sup>22</sup>

**§ 902. Separate Penalty Incurred for each Employee Kept on Duty Beyond Statutory Period Though Due to Same Cause.** The act of a carrier in requiring or permitting members of a train crew, who go on duty at the same time and off duty at the same time, to work overtime, does not constitute a single offense.

20. Section 1 of the Hours of Service Act.

21. Act of May 4, 1916, 39 Stat. at L. 61. Appendix I, *infra*.

22. Missouri, K. & T. R. Co. v. United States, 231 U. S. 112, 58 L. Ed. 144, 34 Sup. Ct. 26.



A separate penalty is incurred thereby for each employe thus kept on duty beyond the statutory period; for the statute provides that any carrier who permits any employe to remain on duty in violation of its terms, shall be liable for each and every violation.<sup>23</sup> "The main question is," said Mr. Justice Holmes for the court in the case cited, "whether, when several persons thus are kept beyond the proper time by reason of the same delay of a train, a separate penalty is incurred for each or only one for all. The Circuit Court of Appeals decided for the Government without discussion. The petitioner cites many cases in favor of the proposition that generally, when one act has several consequences that the law seeks to prevent, the liability is attached to the act, and is but one. It argues that the delay of the train was such an act and that the principle, which is a very old one, applies. *Baltimore & Ohio South-western R. R. Co. v. United States*, 220 U. S. 94. But unless the statute requires a different view, to call the delay of the train the act that produced the wrong, is to beg the question. See *Memphis & Charleston R. R. Co. v. Reeves*, 10 Wall. 176. *Denny v. New York Central R. R. Co.*, 13 Gray, 481. The statute was not violated by the delay. That may have made keeping the men overtime more likely, but was not in itself wrongful conduct *quoad hoc*. The wrongful act was keeping an employe at work overtime, and that act was distinct as to each employe so kept. Without stopping to consider whether this argument would be met by the proviso declaring a 'delay' in certain cases not to be within the statute, it is enough to observe that there is nothing to hinder making each consequence a separate cause of action or offence, if by its proper construction the law does so; see *Flemister v. United States*, 207 U. S. 372, 375; so that the real question is simply what the statute means. The statute makes the carrier who permits 'any employe' to remain on duty in violation of its terms, liable to a penalty 'for each and every violation.' The implication

23. *Missouri, K. & T. R. Co. v. United States*, 231 U. S. 112, 58 L. Ed. 144, 34 Sup. Ct. 26.

of these words cannot be made much plainer by argument. But it may be observed as was said by the Government that as towards the public every over-worked man presents a distinct danger, and as towards the employes each case of course is distinct."

**§ 903. Statute may not be Evaded by Requiring Service of Another Kind after Statutory Period.** The purpose of the law is to secure additional safety by preventing employes from working longer hours than those specified in the act. An employe, therefore, may not be required to perform a duty in any capacity beyond the total fixed in the statute. The power of Congress to limit the hours of labor of employes engaged in interstate transportation would be defeated if the carriers could prolong the period of service by the commingling of duties relating to interstate and intrastate operations.<sup>24</sup> In so far as train employes are concerned, the statute is limited to those who are actually engaged in or connected with the movement of a train. The purpose of the legislation would be defeated if such employes might be required or permitted to occupy the hours of labor intended for rest with railroad service of another kind.<sup>25</sup> "To justify defendants' claim, the statute should read that: 'No train dispatcher shall be required or permitted to be on duty as a train dispatcher for a longer period than nine hours in any twenty-four-hour period, but after he has been relieved as a train dispatcher the carrier may require him to serve as a ticket seller, provided he be given eight consecutive hours off duty.' That, however, is not the way the statute was written. An adoption of defendants' version would be not only contrary to recognized canons of statutory construction, but also destructive of the intended cure of a recognized evil. It is a matter of common knowledge (attested by the carriers' petitions to the Interstate Commerce Com-

24. *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. Ed. 878, 31 Sup. Ct. 621.

25. *San Pedro, L. A. & S. L. R. Co. v. United States*, 213 Fed. 326.

mission immediately after the passage of the act for time in which to secure additional shifts of train dispatchers) that prior to the act carriers were having 24-hours work divided between two shifts, and that at most of the stations the train dispatchers acted also as ticket sellers or in other capacities. If 12 hours of mixed work as train dispatcher and ticket seller is forbidden, it would be simply an evasion to require 6 consecutive hours of duty as a train dispatcher to be followed by 6 consecutive hours of duty as a ticket seller. The evil to be cured did not come from the employes' selling tickets or doing work for other people when off duty, but from the power of the carriers, customarily exercised, to require their employes who were concerned with train movements to do extra and overtime work."<sup>26</sup>

### B. Limitations upon Hours of Service.

§ 904. **Limitation upon the Hours of Service of Employes Engaged in or Connected with Movement of Trains.** It is unlawful under the statute for any common carrier, its officers or agents, subject to the statute, to require or permit any employes subject to the act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employe of such common carrier shall have been continuously on duty for sixteen hours, he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty.<sup>27</sup>

26. *Delano v. United States*, 136 C. C. A. 243, 220 Fed. 635.

27. *Atchison, T. & S. F. R. Co. v. United States*, 244 U. S. 336, 61 L. Ed. 1175, 37 Sup. Ct. 635; *Missouri, K. & T. R. Co. v. United States*, 231 U. S. 112, 58 L. Ed. 144, 34 Sup. Ct. 26; *St. Louis, I. M. & S. R. Co. v. McWhirter*, 229 U. S. 265, 57 L. Ed. 1179, 33 Sup. Ct. 858; *Minneapolis & St. L. R. Co. v. United States*, 157 C. C. A.

356, 245 Fed. 60; *Baltimore & O. R. Co. v. United States*, 154 C. C. A. 593, 242 Fed. 1; *United States v. Minneapolis & St. L. R. Co.*, 236 Fed. 414; *Denver & R. G. R. Co. v. United States*, 147 C. C. A. 132, 233 Fed. 62; *Southern Pac. Co. v. United States*, 137 C. C. A. 584, 222 Fed. 46; *United States v. Southern Pac. Co.*, 136 C. C. A. 351, 220 Fed. 745; *San Pedro, L. A. & S. L. R. Co.*, 136

No such employe who has been on duty sixteen hours in aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having at least eight consecutive hours off duty.<sup>28</sup> "There are two separate and distinct periods of duty provided for in this section. The first period is that referred to in the first clause of the section, and that period is designated as 'sixteen consecutive hours.' The second period is that referred to in the second clause of the section, and that period is designated as 'sixteen hours in the aggregate.' The purpose of the distinction in the two periods of duty is found in the following provision requiring succeeding periods of rest. When an employe has been *continuously* on duty for sixteen hours, he must be relieved, and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and if he has been on duty sixteen hours in the *aggregate* in any twenty-four-hour period, he must not be required or permitted to continue or again go on duty without having at least eight hours off duty."<sup>29</sup>

**§ 905. When an Employe is "on Duty"—Commencement and Termination of Service.** The statute prescribes that the employes subject thereto shall not remain "on duty" for a longer period than that prescribed therein. The courts have generally held that a

C. C. A. 343, 220 Fed. 737; Northern Pac. R. Co. v. United States, 136 C. C. A. 200, 220 Fed. 108; United States v. Oregon-Washington R. & Nav. Co., 213 Fed. 688; United States v. Northern Pac. R. Co., 213 Fed. 539; San Pedro, L. A. & S. L. R. Co. v. United States, 130 C. C. A. 28, 213 Fed. 326; Great Northern R. Co. v. United States, 127 C. C. A. 595, 211 Fed. 309; United States v. Missouri Pac. Ry. Co., 206 Fed. 847; United States v. Kansas City Southern R. Co., 121 C. C. A. 136, 202 Fed. 828; United States v.

Denver & R. G. R. Co., 197 Fed. 629; United States v. Chicago, M. & P. S. Ry. Co., 195 Fed. 783; United States v. St. Louis Southwestern Ry. Co. of Texas, 189 Fed. 954; United States v. Illinois Cent. R. Co., 180 Fed. 630; Osborne's Adm'r v. Cincinnati, N. O. & T. P. R. Co., 158 Ky. 176, Ann. Cas. 1915D 449, 164 S. W. 818.

28. Section 2 of the Hours of Service Act.

29. Southern Pac. Co. v. United States, 137 C. C. A. 584, 222 Fed. 46.

train employe goes "on duty" within the meaning of the statute at the time he reports for work as required by the rules and regulations of the carrier and that he remains "on duty" while he is performing any service in and about his train, or is held responsible for the performance of such service should occasion arise.<sup>30</sup> The term "on duty" includes all the time during which the employe is performing service, or is held responsible for the performance of service. An employe goes "on duty" at the time he begins to perform service or at which he is required to be in readiness to perform service, and goes "off duty" at the time he is relieved from service and from responsibility for performance of service;<sup>31</sup> but employes dead-heading on passenger trains or on freight trains and not required to perform, and not held responsible for the performance of any service or duty in connection with the movement of the train upon which they are dead-heading, are not, while so dead-heading, "on duty" as that phrase is used in the act.<sup>32</sup> When the rules of a railroad company require its employes to report thirty minutes before the leaving time of a train, and an employe complies with

30. *Missouri, K. & T. R. Co. v. United States*, 231 U. S. 112, 58 L. Ed. 144, 34 Sup. Ct. 26; *San Pedro, L. A. & S. L. R. Co. v. United States*, 130 C. C. A. 28, 213 Fed. 326; *United States v. Denver & R. G. R. Co.*, 197 Fed. 629; *United States v. Chicago, M. & P. S. Ry. Co.*, 197 Fed. 624; *United States v. Kansas City Southern Ry. Co.*, 189 Fed. 471; *United States v. Illinois Cent. R. Co.*, 180 Fed. 630.

31. Conf. Ruling No. 287-b.

32. Conf. Ruling No. 74.

"The Interstate Commission, however, has promulgated rule No. 74, providing that 'employees 'deadheading' on passenger trains or on freight trains and not required to perform, and not held re-

sponsible for the performance of, any service or duty in connection with the movement of the train upon which they are 'deadheading,' are not, while so 'deadheading' 'on duty' as that phrase is used in the Act regulating the hours of labor." This construction, although it does not have the binding force of a court decision, is yet entitled to great weight on account of the important duties this high Commission exercises in administering those remedial federal statutes, and we concur in its soundness when applied to the facts of this case." *Osborne's Adm'r v. Cincinnati, N. O. & T. P. R. Co.*, 158 Ky. 176, Ann. Cas. 1914D 449, 164 S. W. 818.

this rule by arriving at the engine thirty minutes before leaving time, he is "on duty" within the meaning of the act.<sup>33</sup> "An employee is on duty when he is at his post in obedience to rules or requirements of his superior and ready and willing to work, whether actually at work or waiting for orders or for the removal of hindrances from any cause. The words 'on duty' appear to have been intelligently chosen and used in the composition of the statute to bar all excuses for non-compliance with its requirements by any pretext of misunderstanding its meaning."<sup>34</sup> Where a train crew after the derailment of the train proceeded to a farm house to await the arrival of the derrick, and partook of a luncheon and rested under the shade of trees until the arrival of the derrick, they were nevertheless on duty as between themselves and the company during the entire period.<sup>35</sup>

**§ 906. Effect of Brief Periods Off Duty in Breaking Continuity of Service.** Short periods off duty will

33. *United States v. Illinois Cent. R. Co.*, 180 Fed. 630, in which the court said: "It does not make any difference whether he was paid for this time or not, that was the time his work and the strain on him began. The work of an engineer, an employee of the railroad, begins when under the rule of the company he is there and is at work in connection with the preparation of the engine for the moving of the train. He must look over that engine. He must see that it is oiled up. He must see that the air brakes are all right. He must move the engine down over the tracks and across the switches to connect it with the train. And in my opinion he is on duty, within the meaning of the Act, during the time he is doing these things. If he goes there a half an hour before

the time to start to do these things, during the time he is there doing them he is on duty. That is my view of it."

34. *United States v. Chicago, M. & P. S. Ry. Co.*, 195 Fed. 783.

"One of the delays was while the engine was sent off for water and repairs. In the meantime the men were waiting, doing nothing. It is argued that they were not on duty during this period and that if it be deducted, they were not kept more than sixteen hours. But they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were none the less on duty when inactive." *Missouri, K. & T. R. Co. v. United States*, 231 U. S. 112, 58 L. Ed. 144, 34 Sup. Ct. 26.

35. *Denver & R. G. R. Co. v. United States*, 147 C. C. A. 132, 233 Fed. 62.

not ordinarily break the continuity of the service within the meaning of the law.<sup>36</sup> For example, it was held that a lay-off from thirty to forty-five minutes for breakfast and of about one hour each for the midday and evening meals, did not break the continuity of the service.<sup>37</sup> "The purpose of the statute is plain, and it must be so construed as to promote its policy. The hours of service of railway trainmen are long at best, leaving only 8 hours for rest and recreation, and if this brief period can be broken into fragment the purpose and policy of the law will be entirely frustrated. If a train crew may be laid off for an hour and a half at one point to suit the convenience or necessities of the company, it may be laid off for a like period at another, and the members of the crew thus wholly deprived of any substantial period for either sleep or rest."<sup>38</sup> If a crew is laid off for a definite period of three hours, for example, at a terminal or other place where the crew might rest, such lay-off would no doubt break the continuity of the service; but where a crew was laid off for an indefinite period, awaiting the arrival of a delayed engine, and they did not know at what moment the train might move and had no place to go except to a bunk house or remain in the caboose, such a respite from duty did not break the continuity of service.<sup>39</sup> A delay of fifty-five minutes at a station during which time the train was placed upon a siding and the switch locked, the headlight extinguished and the crew retired to the caboose, did not break the continuity of duty. "But it is said by defendant," said the court, "that, however this may be, there was no consecutive service of 16 hours because of the layout of 55 minutes at Osier. This latter, as we have seen, was in order that east-bound train No. 442 might pass. The record shows that the hour of arrival of this latter was uncertain, except that it seems to have been momentarily expected. It might come in a few

36. *United States v. Northern Pac. R. Co.*, 213 Fed. 539.

37. *United States v. Chicago, M. & P. S. Ry. Co.*, 197 Fed. 624.

38. *United States v. Northern Pac. R. Co.*, 213 Fed. 539.

39. *United States v. Chicago, M. & P. S. Ry. Co.*, 197 Fed. 624.

minutes, or it might not arrive in an hour. Pending its arrival, the train here involved was rendered safe by being put into a siding and the switch locked. As a matter presumably of economy the headlight was extinguished. All this done, the crew retired to the caboose, the brakemen to utilize the uncertain interval in a nap, the conductor in reading. There was, however, no release of the crew by the train dispatcher, and their pay covered the time they were held at Osier. It is said that, upon this state of facts, the crew ceased to be on duty during the wait upon the siding. This, however, is clearly untenable. True, as the conductor in effect testified, they ceased to be responsible during this period for the operation of the train, for it was not in motion. It is evident, however, that they became instead, intrusted with its custody. It was further their duty to know immediately of the arrival of No. 442, whether this occurred in 10 minutes or in 55, and immediately upon such arrival they were charged with the responsibility of relighting the headlight, leaving the siding, and proceeding to destination. As long ago as *Milton* it was said: 'They also serve who only stand and wait.' It detracts nothing from this great truth as applied to the present situation that the tired crew at this hour of the night utilized the wait in sleep or in a book. They were there on pay; they were there in charge of the train; they were there subject to active duty as soon as No. 442 whistled for the station. Suppose that the latter train, instead of taking 55 minutes to arrive, had arrived in only 10. Would it be contended that such an interval would have broken the continuity of duty? And yet the principle in each case is precisely the same. We are of opinion that such a view of the statute as is here contended for by the defendant would ill accord with the employes and travelers upon railroads by limiting the hours of service of employes thereon.' A delay under the circumstances here disclosed constituted at most simply 'a trivial interruption,' such as under *United States v. Atchison, T. & S. F. Ry. Co.*, 220 U. S. 37, 44, 31 Sup. Ct. 362,



363 (55 L. Ed. 361), 'will not be considered.' To hold otherwise will be practically to nullify the statute."<sup>40</sup>

§ 907. **Release from Duty for Definite Period of Two Consecutive Hours.** The Circuit Court of Appeals for the 8th Circuit, Judge Sanborn dissenting, held that an absolute release of a train crew for a period of two hours at a "turn-around" terminal does not break the continuity of service.<sup>41</sup> "Were the periods of release, taking into consideration the purposes of the law," said Judge Carland in the majority opinion, "periods of rest or off duty which the law requires? If they were, then there was not in any case a longer period of service or on duty than sixteen consecutive hours. If, on the contrary, these periods were of such length, or at such a time and place, or in connection with such service, that, although absolutely relieved from duty, the employees did not receive that rest which it was the policy of the law to secure, then the periods of release did not prevent the hours of service from being consecutive and the law was violated. . . . That an employe is absolutely relieved from service is not of controlling importance, if the time is so short or the opportunities for rest are so meager that for all practical purposes an employe does not have the opportunity for rest which the law requires. It was decided in *Southern Pacific Co. v. United States* (Circuit Court of Appeals, 9th Cir.) 222 Fed. 46, 137 C. C. A. 584, that whether the break or intermission in the hours of service are such as the law will recognize depends upon their character as periods of substantial rest, and that the question as to whether the periods of release gave opportunity for substantial periods of rest was for the jury, under the evidence in each case. In *United States v. Chicago, M. & P. S. Ry. Co.* (D. C.) 197 Fed. 624, and *United States v. Denver & R. G. R. Co.* (D. C.) 197 Fed. 629, cited with approval by the

40. *United States v. Denver & Co. v. United States*, 157 C. C. A. R. G. R. Co., 197 Fed. 629. 356, 245 Fed. 60.

41. *Minneapolis & St. L. R.*

Supreme Court in *Missouri, K. & T. Ry. Co. v. United States*, 231 U. S. 112, 34 Sup. Ct. 26, 58 L. Ed. 144, it was decided that not every release from duty was such as the law contemplated, but that each release must be determined according to the facts in the particular case. There may be cases, undoubtedly, where the release is for such a time and under such circumstances that the court may say as matter of law that the release was or was not such as to be within the requirement of the law; but in the present case the parties waived a jury, and submitted the facts and all legitimate inferences to be drawn therefore to the trial court for decision. That court found that the periods of release under the circumstances did not break the consecutive character of the hours of service, and entered judgment accordingly. We are of the opinion that the periods of release were periods of waiting which gave no proper opportunity for rest. The service was what is termed a 'turn-around' service. If the train crew can be given an absolute dismissal for the time which elapses at any particular terminal before the return trip is made, with only the opportunity for rest which is shown by the evidence in this case, and such time is held to break the consecutive hours of service, then the purpose of the law will be largely defeated, and the employes permitted to remain on duty for a longer period than is lawful."

**§ 908. Duty to Substitute Relief Crews at Intermediate Terminals to Prevent Excessive Hours.** Ordinarily, train employes delayed as the result of casualties or unavoidable accidents or causes not known to the carrier or its officers in charge of such employes at the time they leave a terminal, and which could not have been foreseen, may continue on duty to the terminal or the end of their "runs," regardless of whether the 16-hour period prescribed by the statute has expired; but they cannot be held in service beyond the 16-hour period prescribed in the statute if a suitable stopping place should be reached at which they may be relieved, and, if such a place is reached, and the

employees are not relieved, there is a violation of the law.<sup>42</sup> A terminal, in railway parlance, ordinarily means the place where an employe goes on duty as a member of a particular train crew and to which, in the regular course of business, he returns and is relieved from duty. In the operation of railroads, passenger crews frequently handle trains through several division points or terminals. For example, in *Atchison, T. & S. F. R. Co. v. United States*,<sup>43</sup> it appeared that a crew operated a passenger train from Los Angeles Calif. to Parker Ariz., passing in transit through San Bernardino Calif., an intermediate division point on the same railroad. After the usual rest at Parker the crew took charge of another passenger train for the return trip to Los Angeles. On one of the return trips, the crew was delayed between Parker and San Bernardino on account of an unavoidable accident, but the employes continued in charge of the train until it reached Los Angeles, passing through the station of San Bernardino, which was a point known and designated as a division terminal, and which was a place appointed and customarily used as a terminal from and to which crews of certain other passenger and freight trains brought their trains but which was not a terminal for train crews in charge of the train in question operating between Parker and Los Angeles. The question was presented to the court whether, under the law, employes were permitted to return to their own terminal—Los Angeles—or whether the carrier was required to relieve them at San Bernardino and operate the train thereafter to Los Angeles with a new crew. The federal Supreme Court, in holding that the crew should have been relieved by another at San Bernardino, said: "It is the contention of the railroad company that the detention in service beyond the period prescribed by the statute being due to an unavoidable accident,

42. *Atchison, T. & S. F. R. Co. v. United States*, 136 C. C. A. 354, 220 Fed. 748; *United States v. Southern Pac. Co.*, 136 C. C. A. 351, 220 Fed. 745; *A. & S. L. R. Co. v. United States*, 136 C. C. A. 343, 220 Fed. 737.  
43. 244 U. S. 336, 61 L. Ed. 1175, 37 Sup. Ct. 635.

the limitation of the statute for that trip was at an end and the company was not liable for the penalty imposed because of the extra service required upon that trip. On the other hand, the Government insists that in view of the prime purpose of the statute to limit the hours of service so as to keep within the time prescribed, and not to subject the men to service beyond these hours, it was the company's duty to relieve the crew at San Bernardino by supplying their places with others instead of keeping them on duty to Los Angeles, thereby requiring service in excess of that permitted by the statute. Considering these opposing contentions, it must be remembered that the purpose of the act was to prevent the dangers which must necessarily arise to the employee and to the public from continuing men in a dangerous and hazardous business for periods so long as to render them unfit to give that service which is essential to the protection of themselves and those entrusted to their care. It is common knowledge that the enactment of this legislation was induced by reason of the many casualties in railroad transportation which resulted from requiring the discharge of arduous duties by tired and exhausted men whose power of service and energy had been so weakened by overwork as to render them inattentive to duty or incapable of discharging the responsible labors of their positions. To promote the end in view, so essential to public and private welfare, Congress, in this Hours of Service Act, provided the limitations named upon the hours of service. The act is remedial and in the public interest, and should be construed in the light of its humane purpose. Congress also realized that it might be impracticable in all cases to keep the employment within the hours fixed in the act, and added a proviso to relieve from the general application of the requirements of the law so that it might not apply when the employment beyond the periods named was caused by casualty or unavoidable accident or the act of God, or where the delay was the result of a cause not known to the carrier or its officer or agent at the time the employee left a terminal, and which could not have been foreseen.

It was not the intention of the proviso, as we read it, to relieve the carrier from the exercise of diligence to comply with the general provisions of the act, but only to relieve it from accidents arising from unknown causes which necessarily entailed overtime employment and service. *United States v. Dickson*, 15 Pet. 141. It is still the duty of the carrier to do all reasonably within its power to limit the hours of service in accordance with the requirements of the law. Applying this view to the present case, it was the duty of the company, after the breakdown between Barstow and San Bernardino, to use all reasonable diligence to avoid the consequences of the unavoidable accidents which had delayed the movement of the train and to relieve the crew by the means practically at hand. This the company might have done by putting on a relief crew at San Bernardino instead of permitting an already exhausted crew, when their condition is judged by the service performed, to hazard their own lives and safety as well as the safety of others by continuing the journey to Los Angeles. The requirement of continued service after the train reached San Bernardino was not occasioned by the unforeseen accidents, but was the direct consequence of the failure of the company to relieve the employes by the substitution of a fresh crew, as the record shows could readily have been done. It is contended by the company that this construction of the statute is opposed to that given by the Interstate Commerce Commission, the body entrusted by Congress with the enforcement of the act, and is against the understanding of the law which the Commission had given the company to believe would be enforced. It appears that two constructions of the act have been given by the Interstate Commerce Commission; one on March 16, 1908, as follows: 'The instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employees on trains only until such employees, so delayed, reach a terminal or

relay point.' This construction would plainly require the railroad company to have substituted a new crew at San Bernardino and not to require the further service to Los Angeles. The other construction, and the one which the company contends should be controlling, was given later, on May 24, 1908, and is as follows: Section 3 of the law provides that: 'The provisions of this Act shall not apply in any case of casualty or unavoidable accident or act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen.' 'Any employee so delayed may therefore continue on duty to the terminal or end of that run. The proviso removes the application of the law to that trip. (See Rule 287.)' These possible diverse rulings of the Commission were rescinded on April 9, 1917, by the following order of the Commission: 'Conference Rulings 88 (b) and 287 (i), relating to the Hours-of-Service-Law, rescinded, for the reason that they were issued as informal expressions of the Commission's views to act as guide until the questions could be judicially interpreted, and they have been judicially interpreted and are now before the court on appeal there is no further occasion for these former views of the Commission.' If the construction contended for by the company be adopted, it would follow that the employees might be kept in service for indefinite periods, until the termination or end of the run should be reached, which it is not difficult to suppose might require many hours of service beyond the limitations prescribed in the body of the act. This construction would defeat the purpose of the act by permitting the employees to endanger themselves and the public by the continued service of tired and exhausted men. We reach the conclusion that in keeping the crew in service beyond San Bernardino the Company was guilty of a violation of the statute."

**§ 909. Fireman Engaged in Watching an Engine on Duty Within Meaning of Statute.** When a train is

side-tracked and the crew is laid off for rest because of the 16-hour law, a fireman who thereafter remains on the engine for the purpose of keeping up the fire and steam and otherwise watching the engine is thereby actually engaged in or connected with the movement of a train within the meaning of the statute. Such work beyond the statutory period is, therefore, a violation of the act.<sup>44</sup> "The plaintiff in error contends that while their fireman was acting as engine watchman on the locomotive, for the period during which their freight train and locomotive were tied up on the siding, the employe was not a person 'actually engaged in or connected with the movement of any train,' within the meaning of those words as used in the act of Congress; and further that the final eight hours during which their employe was engaged as and performing the duties of engine watchman on their locomotive, and while it was tied up and side-tracked on their siding as aforesaid, constituted no portion of the period of duty covered by the act of Congress, and that, so far as the final period of eight hours is concerned, the act does not apply. With respect to the first of these contentions, we do not think that the narrow interpretation insisted upon by the plaintiff in error can be applied to the language of the act above quoted. We cannot believe that it was the intention of Congress that the word 'movement' should be restricted to the actual revolution of the wheels of a train or locomotive engaged in interstate commerce, for, if that interpretation were the correct one, obviously the very object of the act, the promotion of the safety of employes and travelers upon railroads would be frustrated. The sidings of a railroad are a part of its system and are indispensable to the proper operation and movement of its trains. Tying up on a siding for any purpose, whether to await orders, or

44. Northern Pac. R. Co. v. United States, 130 C. C. A. 157, 213 Fed. 577; San Pedro, L. A. & S. L. R. Co. v. United States, 130 C. C. A. 28, 213 Fed. 326; United

States v. Missouri Pac. Ry. Co., 206 Fed. 847; United States v. Great Northern Ry. Co., 206 Fed. 838.

for the passing of other trains, or for any other purpose connected with the transportation of freight or passengers, is as much a part of the general movement of a train as the actual running thereof on the main line and at scheduled periods. The fact that, as in this case, the delay was for a period of eight consecutive hours does not operate to make it any the less a delay occurring in the ordinary course of the general movement of the trains of the plaintiff in error. Such delays are a part of the general operations whereby traffic over railroads is conducted. Following this contention of the plaintiff in error to its logical conclusion, the result would be that the freight train and locomotive in this case could have been side-tracked and tied up for an hour at a time, at intervals of an hour, and its employe required to remain on duty as fireman and as engine watchman alternately for an indefinite period, yet it would not have been guilty of a violation of the act under consideration. It is next contended by the plaintiff in error that the final eight hours during which their employe was engaged in performing the duties of engine watchman on their locomotive, while it was tied up and side-tracked on their siding, constituted no portion of the period of duty covered by the act. The duties of an engine watchman, as appears from the agreed statement of facts in this case, consisted in watching the quantity of water in the boiler of the engine which he was employed to watch, and in replenishing the same so that the engine could always have an adequate supply of water whereby steam could be adequately and efficiently and promptly generated, so that, when the engine was again to be moved, it could move under its own steam without delay incident to waiting until the engine could have again developed sufficient steam, and likewise to watch the fire in the fire box of the engine, and to replenish the same with fuel, so that the fire would be kept up to such an extent that steam would be generated, so that when it was next desired to move the engine, the same could move without delay by means of the steam so generated by means of the fire.



But wherein did these duties of the employe as engine watchman differ from his duties as fireman? In no essential particular, as we view it. It is true that, when a locomotive is actually running, the duties of a fireman, with respect to keeping a proper amount of water in the boiler, and a proper amount of fire in the fire box, may be more strenuous and occupy his time to a greater extent than when the locomotive is side-tracked and tied up on a siding; but that would be merely a question of degree and would not affect the general nature of the duties of his occupation. The all-important fact not to be lost sight of in this case is that the employe was required and permitted to continue to apply himself to and perform, for a period of eight consecutive hours (after 16 consecutive hours of labor), duties very similar to those which he had been performing for the 16 hours immediately before, without being granted any period during which he might have an opportunity for rest. The argument of the plaintiff in error, in connection with the contention now under consideration, is that the safety of its employes and of the travelers upon its railroad was not imperiled by the employe remaining on duty the additional period of eight hours as engine watchman. Conceding that this might be true as to the employes and travelers upon other trains, the fact would still remain that had the fireman, Bergen, during this additional period while he was acting as engine watchman, through fatigue and general debility due to excessive hours of labor, permitted the water in his locomotive to become so low that an explosion would have been caused thereby, his own safety, and perhaps the safety of the other members of the crew of the train, who had during that period retired to rest upon the train, would have been imperiled. There is another and a much stronger argument which we think fully supports the views which we have stated. The act prohibits any common carrier from requiring or permitting any 'employe' to be and remain on duty for a longer period than 16 consecutive hours. There is no distinction made in the act as to any particular duty or duties which

an employe may be performing during the whole time, or any portion of the time he is on duty. In this case, when Bergen's duties were changed from those of fireman to those of engine watchman, he continued to be no less an employe of the railroad company. In other words, had he been employed as an engine watchman during the entire period of 24 consecutive hours, there could be no question but that such employment would have constituted a violation of the act. The fact that during the 24-hour period he was employed for 16 hours as fireman and for 8 hours as engine watchman does not lessen the offense.<sup>45</sup>

**§ 910. Limitation upon the Hours of Service of Employes Handling Orders Affecting Train Movements.** That part of section 2 of the Act, commonly referred to in the decisions as the "operators' proviso" prescribes that it shall be unlawful for any carrier subject to the act to require or permit any operator, train dispatcher, or other employe who, by the use of the telegraph or telephone, dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places and stations continuously operated day and night, or for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime.<sup>46</sup> In

45. *Great Northern R. Co. v. United States*, 127 C. C. A. 595, 211 Fed. 309.

46. *Chicago & A. R. Co. v. United States*, 157 C. C. A. 295, 244 Fed. 945; *Baltimore & O. R. Co. v. United States*, 156 C. C. A. 19, 243 Fed. 153; *Atchison, T. & S. F. R. Co. v. United States*, 155 C. C. A. 644, 243 Fed. 114; *Illinois C. R. Co. v. United States*, 154 C. C. A. 425, 241 Fed. 667; *Atchison, T. & S. F. R. Co. v. United States*, 150 C. C. A. 168, 236 Fed. 906;

*United States v. Missouri Pac. R. Co.*, 235 Fed. 944; *United States v. Illinois Cent. R. Co.*, 234 Fed. 433; *Chicago & N. W. R. Co. v. United States*, 141 C. C. A. 138, 226 Fed. 30; *Chicago, R. I. & P. R. Co. v. United States*, 141 C. C. A. 135, 226 Fed. 27; *United States v. Grand Rapids & I. R. Co.*, 140 C. C. A. 177, 224 Fed. 667; *Delano v. United States*, 136 C. C. A. 243, 220 Fed. 635; *United States v. Atchison, T. & S. F. R. Co.*, 220 U. S. 37, 55 L. Ed. 361, 31 Sup.

case of emergency the said employes so handling train orders may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week.<sup>47</sup> The Interstate Commerce Commission is, however, authorized after a full hearing in a particular case and for good cause shown, to extend the period within which a common carrier shall comply with the foregoing provisions relating to employes so handling train orders.<sup>48</sup>

**§ 911. Applicability of Operators' Proviso to Tower Men and Switch Tenders in Railroad Yards—Conflicting Rulings.** The proviso in section 2 of the act which prescribes that no operator, train dispatcher, or "other employe" who, by the use of the telegraph or telephone, dispatches, reports, transmits, receives or delivers orders pertaining to or affecting train movements, shall be required to or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places and stations operated only during the daytime except in the emergency specified in the statute, covers every employe who, by the use of the telegraph or telephone, handles orders pertaining to or affecting train movements. The Interstate Commerce Commission in a conference ruling<sup>49</sup> decided that

Ct. 362; *United States v. Houston, Belt & Terminal R. Co.*, 125 C. C. A. 481, 205 Fed. 344; *United States v. St. Louis Southwestern R. Co.*, 189 Fed. 954.

47. *United States v. Missouri Pac. R. Co.*, 156 C. C. A. 466, 244 Fed. 38; *Baltimore & O. R. Co. v. United States*, 156 C. C. A. 19, 243 Fed. 153; *United States v. Missouri Pac. R. Co.*, 235 Fed. 944; *United States v. Denver & R. G. R. Co.*, 147 C. C. A. 132, 233 Fed. 62; *United States v. Baltimore & O. R. Co.*, 226 Fed. 220; *United*

*States v. Denver & R. G. R. Co.*, 136 C. C. A. 275, 220 Fed. 293; *United States v. Chicago & N. W. Ry. Co.*, 219 Fed. 342; *United States v. Missouri Pac. R. Co.*, 130 C. C. A. 384, 209 Fed. 562; *United States v. Southern Pac. Co.*, 126 C. C. A. 384, 209 Fed. 562; *United States v. Kansas City Southern R. Co.*, 121 C. C. A. 136, 202 Fed. 828.

48. Section 3 of the Hours of Service Act, Appendix I, *infra*.

49. Conf. Ruling No. 342.

a trainman required by the rules of the carrier, in conjunction with his duties as trainman, to send, receive, or deliver orders affecting the movement of trains, came within the operators' proviso; but that the practice of requiring conductors of trains delayed at stations with no regularly assigned operators on duty and conductors of trains about to be overtaken by superior trains, to telephone or telegraph the train dispatcher for instructions, did not place them within the limitation of service covering operators.<sup>50</sup> The Fifth Circuit

50.. United States v. Florida East Coast R. Co., 137 C. C. A. 571, 222 Fed. 33, in which Judge Maxey said: "It will be observed that the first part of the section refers to employes generally, subject to the act, and renders it unlawful for a carrier to require or permit any employe to be or remain on duty for a longer period than 16 consecutive hours, etc. The proviso, however, except operators, train dispatchers, and other employes, who by the use of the telegraph or telephone transmit, report, etc., orders pertaining to or affecting train movements, from the general language thus employed and provides for them a special rule. For reasons deemed wise by the Congress, it was thought that telegraph operators, train dispatchers, and other employes of that class should have shorter hours for work and longer intervals of rest; and hence the provision directly applicable to them, that their work hours should be limited to 9 and 13, respectively, accordingly as they might be employed in towers, offices, places, and stations continuously operated night and day, or in towers, offices, etc., operated only during the daytime. The purpose of adding the proviso was to prescribe shorter

hours for work for telegraph and telephone operators, and other employes, whose primary and principal duty require them to operate telegraphic instruments and telephones for transmitting, etc., orders affecting train movements generally. And that such construction is correct is evidenced by the requirement that such employes must perform their duties at a fixed place and that their hours of service at such place shall not exceed those named in the proviso. In this connection it is well to recall the language of the proviso: 'Provided, that no operator,' etc., 'shall be required or permitted to be or remain on duty for a longer period,' etc., 'in all towers, offices, places and stations,' etc.—thus evidencing the intention that such employes must have a fixed place for work, and at such place they should not be required or permitted to work a longer time than the number of hours prescribed. If the proviso be construed to include a conductor, what number of hours, it may be asked, shall he be permitted to work during the 24-hour period? Shall it be 16, 13, or 9 hours? Having regard for the language of the proviso, it will be scarcely possible to give a satisfactory re-

Court of Appeals held that tower men were not employes engaged in the handling of orders affecting train movements,<sup>51</sup> while a contrary conclusion was reached by the Seventh Circuit Court of Appeals.<sup>52</sup> In construing the words "or other employe" in the operators' proviso of section 2, the Eighth Circuit Court of Appeals held that the term must be construed to mean an employe engaged in the same character of service as a train dispatcher or operator, who, by the use of the telegraph or telephone, performs the work described in the proviso, and that, therefore, switch tenders whose primary duties were to throw switches but who regularly and habitually transmitted by telephone, information affecting train movements, were not subject to the operators' proviso;<sup>53</sup> but the Seventh Circuit Court of

ply to the question—a difficulty which affords additional ground for holding that as to such employe the proviso is altogether inapplicable. It seems to us that it would plainly violate accepted canons for construing statutes to include in the proviso a train conductor, having no fixed place for work except on a moving train, and who, under the first clause of section 2, may be required or permitted to work for the period of 16 hours. His primary and chief duty requires him to look after his train, and stopping at a station to transmit or receive an order, affecting his immediate train, is a mere incidental service, which cannot operate to classify him as a telegraph or telephone operator or train dispatcher. The contention of counsel for the government is that train conductors are included in the words of the proviso, 'or other employe,' who by the use of the telegraph or telephone dispatches reports, etc. We have endeavored to show that it was not the intention of the lawmakers to so include them."

51. *United States v. Houston Belt & Terminal R. Co.*, 125 C. C. A. 481, 205 Fed. 344.

52. *Chicago & N. W. R. Co. v. United States*, 141 C. C. A. 138, 226 Fed. 30.

53. *Missouri Pac. R. Co. v. United States*, 128 C. C. A. 271, 211 Fed. 893, in which Carland, J., said: "Congress intended the 9-hour provision to apply to employes whose primary duty was to dispatch, report, transmit, receive, or deliver orders pertaining to or affecting train movements. We do not mean by this that the word 'orders' should be limited to technical train orders described in what are known as standard rules for the movement of trains. Congress was dealing with a class of employes engaged primarily in a particular service and the mere form of the order, pertaining to or affecting train movement, is immaterial if it is dispatched, reported, transmitted, received, or delivered by the use of the telegraph or telephone. Where general words follow an enumeration of particular classes of persons or

Appeals, on the other hand, held that a switch tender stationed at a shanty, whose principal duty was to attend to freight yard switches but who regularly transmitted by telephone information affecting train movements to levermen at an interlocking tower located at a point where there was a cross-over for trains of another railroad, came within the class for whose service limits are established by the operators' proviso.<sup>54</sup>

things, they will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The particular words are presumed to describe certain species and the general words to be used for the purpose of including other species of the same genus. The rule is based on the obvious reason that, if the Legislature had intended the general words to be used in their unrestricted sense, they would have made no mention of the particular classes. The words 'other' or 'any other,' following an enumeration of particular classes, are therefore to be read as 'other such like,' and to include only others of like kind or character."

54: Chicago, R. I. & P. R. Co. v. United States, 141 C. C. A. 135, 226 Fed. 27. "We cannot, however," said Judge Mack, "agree that the words 'other employe who by the use,' etc., transmits such orders, are to be qualified by an implied limitation to those whose primary and principal duty is thus described. The remedial purpose of this act, to protect human life and to promote railroad efficiency, demands that despite its penal character its provisions shall be construed and the intent of Congress found from the language ac-

tually used, interpreted according to its fair and obvious meaning. Congress may well have deemed it unsafe to permit employes whose duty it is, not primarily or principally, but ordinarily and habitually, to transmit such important orders, and in doing so to exercise whatever measure of skill, care, alertness, and attention to use of either telegraph or telephone requires, to work 16 hours, however simple or nonfatiguing their ordinary tasks may be. Furthermore, the class that includes only those whose principal duty is to transmit such orders by telegraph or telephone does not include all who concededly are within the proviso; an operator or train dispatcher may also be a station agent, and his primary and principal duties may be in the latter capacity. If, unlike United States v. Mescall, 215 U. S. 26, 30 Sup. Ct. 19, 54 L. Ed. 77, the particular words, 'operators and train dispatchers,' do not exhaust the class and thus make the rule of *ejusdem generis* inapplicable, the only all embracing designation covering those concededly within the proviso, is an employe who ordinarily and habitually uses the telegraph or telephone for the purposes stated. Defendant's employes here in ques-

**§ 912. Hours of Service in Telegraph Offices Operated During Day and Part of Night.** The statute clearly prescribes that operators in telegraph offices, operated only during the daytime, may remain on duty for a period of 13 hours but no longer. It is also quite evident that the act prohibits operators from remaining on duty for a longer period than 9 hours in telegraph offices continuously operated during the night and day of a 24-hour period. In the interpretation of the statute, carriers sometimes contended that the term "continuously operated night and day" did not apply to stations which were operated during the daytime and during a part of the night. For example, it was contended that the 9-hour period did not apply to a station open from 6:30 a.m. to 10:15 p.m.<sup>55</sup> But the courts have uniformly held that the act covers all telegraph offices in which interstate train orders are handled; that the phrase "offices, places and stations continuously operated night and day" means offices whose operation is continued from the day into the night. "If it seems a strained and unwarranted construction," said the court in the case cited, "to hold that an office which is generally closed at 10:15 p.m., and never later than 11, and kept closed till 6:30 a.m., is nevertheless 'continuously operated night and day,' is it not equally strained and unwarranted to hold that an office which is kept open from 6:30 a. m. to 10:15 p. m., or later, is nevertheless 'operated only during the daytime'?" Since the office in question must be assigned to one class or the other, we are of opinion on the whole that it will be more correctly and usefully placed in the night and day class than in the daytime class. If this conclusion gives greater effect to the words 'operated only during the daytime' than to the words 'continuously operated night and day,' we think the objects of the law require that preference be accorded to a construction which

tion come within this class." To the same effect, *Chicago & A. R. Co. v. United States*, 157 C. C. A. 295, 244 Fed. 945.

55. *United States v. Atlantic Coast Line R. Co.*, 128 C. C. A. 275, 211 Fed. 897.

recognizes the legislative intent to permit 13 hours of service in offices kept open only such number of hours in the aggregate as do not materially or substantially exceed the length of an ordinary day, and to prohibit more than 9 hours service in offices kept open such number of hours in the aggregate as necessarily include a material or substantial portion of the night.’<sup>56</sup>

**§ 913. Separate Periods of Service for Operators not Exceeding Total of Nine Hours in Twenty-four Hours, not Unlawful.** Dispatchers and telegraph operators handling train orders, and other employes performing like duties, are prohibited from being on duty for a longer period than nine hours in any twenty-four-hour period in all stations continuously operated night and day. But this provision does not require a period of fifteen hours continuous leisure and a period of nine hours continuous work in one twenty-four-hour period. The hours of work, so long as they do not exceed nine hours in the aggregate, may be distributed within the period of a day. For example, it is not unlawful for a telegraph operator to be employed from 6:30 a. m. until noon and again from 3 p. m. to 6:30 p. m., nine hours, in all, of actual work. “The proviso does not say nine ‘consecutive’ hours, as was said in the earlier part of the section, and if it had said so, or even ‘for a longer period than a period of nine consecutive hours,’ still the defendant’s conduct would not have contravened the literal meaning of the words. A man employed for six hours and then, after an interval, for three, in the same twenty-four, is not employed for a longer period than nine consecutive hours. Indeed, the word consecutive was struck out, when the bill was under discussion, on the suggestion that otherwise a man might be worked for a second nine hours after an interval of half an hour. In order to bring about the effect contended for it would have been necessary to add, as the

<sup>56</sup>. To the same effect: *United States v. Missouri, K. & T. Ry. Co.*, 208 Fed. 957.



section does add in the earlier part, a provision for the required number of consecutive hours off duty. The presence of such a provision in the one part and its absence in the other is an argument against reading it as implied. The Government suggests that if it is not implied a man might be set to work for two hours on and two hours off alternately. This hardly is a practical suggestion. We see no reason to suppose that Congress meant more than it said. On the contrary, the reason for striking out the word consecutive in the proviso given, as we have mentioned, when the bill was under discussion, and the alternative reference in sec. 2 to 'sixteen consecutive hours' and 'sixteen hours in the aggregate,' show that the obvious possibility of two periods of service in the same twenty-four hours was before the mind of Congress, and that there was no oversight in the choice of words."<sup>57</sup>

**§ 914. Two Telegraph Offices in One Community Constitute One "Place" Within Statute, When.** The terms "towers, offices, places and stations," found in section 2 of the act regulating the hours of service of operators, train dispatchers and like employes, mean particular and definite locations. The purpose of the statute and of the proviso for nine hours of service cannot be avoided by erecting or maintaining offices, stations, depots or buildings in close proximity to each other and operating from one a part of the day while the other is closed, and *vice versa*.<sup>58</sup> For example, it appeared in *Illinois Cent. R. Co. v. United States*<sup>59</sup> that the carrier maintained in the same town a depot and an interlocking tower about 800 feet apart. An agent and an operator worked at the depot from 7 a. m. to 7 p. m. At 7 p. m. another operator reported for duty, took charge of the books relating to the movement

57. *United States v. Atchison, T. & S. F. R. Co.*, 220 U. S. 37, 55 L. Ed. 361, 31 Sup. Ct. 362.

58. Conf. Ruling No. 287-f, Appendix I, *infra*.

59. 154 C. C. A. 425, 241 Fed. 667.

of trains at the depot, carried them to the tower, worked therein until 7 o'clock a. m. when he returned to the depot with the train register and order book and turned them over to the operator at the depot. All train orders and messages pertaining to train movements received and delivered between 7 a. m. and 7 p. m. were received and delivered at the depot. In the same manner all orders received and delivered between 7 p. m. and 7 a. m. were received and delivered at the tower. Under these facts the carrier urged that the tower was a night office and the depot a day office and that neither was a day and night office. But the court held that both the tower and depot were one place within the meaning of the statute and therefore a night and day office, and that the carrier violated the statute in keeping the operators on duty more than nine hours. Passing upon similar facts in a former opinion, the same court said: "Obviously the intent of the statute would be defeated if the work at a place of a character requiring attention both day and night were divided between two shifts and performed with separate instruments installed in near proximity. And what could not be done as a new departure would be equally inadmissible as an old custom. The division of the night and day control of train movements in a single restricted district between telegraphic installations in different parts of the same building, or on the north and south sides of the same street, with an oscillation of the paper records and undelivered messages back and forth, would quite clearly not divide the 'place' within the intent of the statute. The case here is not different in principle. The work of the two operators, one at Guthrie and the other at South Guthrie, was a unit in all practical aspects, and it was so recognized in the practice of the company."<sup>60</sup>

### C. Statutory Exceptions and Excuses.

60. Atchison, T. & S. F. R. Co. v. United States, 150 C. C. A. 168, 236 Fed. 906.

**§ 915. When Provisions of Statute Limiting Hours of Service are not Applicable.** A proviso to section 3 of the act prescribes that the provisions of the statute shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officers or agents in charge of such employe at the time said employe left a terminal and which could not have been foreseen.<sup>61</sup> Nor does the act apply to crews

61. Atchison, T. & S. F. R. Co. v. United States, 244 U. S. 336, 61 L. Ed. 1175, 37 Sup. Ct. 635; United States v. Missouri Pac. R. Co., 156 C. C. A. 466, 244 Fed. 38; Atchison, T. & S. F. R. Co. v. United States, 155 C. C. A. 644, 243 Fed. 114; United States v. Atchison, T. & S. F. Ry. Co., 236 Fed. 154; Denver & R. G. R. Co. v. United States, 147 C. C. A. 132, 233 Fed. 62; Missouri, K. & T. R. Co. v. United States, 231 U. S. 112, 58 L. Ed. 144, 34 Sup. Ct. 26; Atchison, T. & S. F. R. Co. v. United States, 136 C. C. A. 354, 220 Fed. 748; United States v. Southern Pac. Co., 136 C. C. A. 351, 220 Fed. 745; San Pedro, L. A. & S. L. R. Co. v. United States, 136 C. C. A. 343, 220 Fed. 737; United States v. Great Northern R. Co., 136 C. C. A. 238, 220 Fed. 630; United States v. Chicago & N. W. Ry. Co., 219 Fed. 342; United States v. Lehigh Valley R. Co., 135 C. C. A. 282, 219 Fed. 532; United States v. New York, Cent. & H. R. R. Co., 134 C. C. A. 369, 218 Fed. 611; Great Northern R. Co. v. United States, 134 C. C. A. 98, 218 Fed. 302; United States v. Northern Pac. R. Co., 131 C. C. A. 372, 215 Fed. 64; United States v. Northern Pac. R. Co., 213 Fed. 539; United States v. Missouri Pac. R. Co., 130 C. C. A. 5, 213

Fed. 169; United States v. Atchison, T. & S. F. Ry. Co., 212 Fed. 1000; United States v. Southern Pac. Co., 126 C. C. A. 384, 209 Fed. 562; United States v. Houston Belt & Terminal R. Co., 125 C. C. A. 481, 205 Fed. 344; United States v. Kansas City Southern R. Co., 121 C. C. A. 136, 202 Fed. 828; Washington, P. & C. Ry. Co. v. Magruder, 198 Fed. 218; United States v. Denver & R. G. R. Co., 197 Fed. 629; United States v. Chicago, M. & P. S. R. Co., 197 Fed. 624; Chicago, B. & Q. R. Co. v. United States, 115 C. C. A. 193, 195 Fed. 241; United States v. Kansas City Southern Ry. Co., 189 Fed. 471.

"The act itself provides that it shall not apply in certain cases, as appears by the proviso hereinabove mentioned. The exceptions found in that proviso are four: First; casualty; second, unavoidable accident; third, act of God; and, fourth 'Where the delay was the result of a cause not known to the carrier \* \* \* at the time said employe left a terminal and which could not have been foreseen.' These four exceptions may be more easily illustrated than defined. First, a large fire and fallen buildings in a city along the right of way of the railroad may illustrate what is meant by

of wrecking or relief trains. "Looking at the proviso as a whole, and with the intent of leaving, if possible, vitality in all its parts, we conceive that Congress said to the railroads: You need not pay penalties for violations in the following instances: Act of God. You are excusable for delay caused by violence of nature in which no human agency participates by act or omission. For example, a washout due to an unprecedented flood that was not and could not reasonably have been anticipated. Unavoidable accident. You are excusable if, at the time and place of the accident that caused the delay, you, through your employes, were in the exercise of due care. For example, a switchtender falls dead at an open switch and a collision immediately follows without any one's fault. Last clause of the proviso, explanatory of unavoidable accident. But you are not excusable if, at the time a train leaves a terminal, you, through your inspectors, either knew or by the exercise of due care might have foreseen a cause that would be likely to produce an accident and consequent delay. For example, incompetent trainmen or defective or inefficient drawbars or air hose, particularly if you had notice of a succession of accidents due to those causes. Casualty (which must differ from the other defenses and must not be so broad as to deprive them of meaning and use). You are excusable for delay from an occurrence or happening due entirely to an outside human agency. For example, your train is overturned by a train of another railroad at a crossing

casualty; second, a derailment of a train caused by the breaking of an axle having a concealed defect not discoverable by inspection may illustrate unavoidable accident; third, the washing away of bridges by a great flood may illustrate an act of God; and, fourth, a diminution of power by reason of engine trouble not ordinarily expected and not discovered upon previous inspection may illustrate a cause

of delay not known to the carrier at the time the employe left a terminal and which could not have been foreseen. It should not be assumed that any of the terms used by Congress in the proviso are synonymous. All words of an act have a proper place and meaning therein, unless the contrary plainly appears." *United States v. Pennsylvania Co.*, 239 Fed. 761.

by reason of the other road's trainmen's disobedience of the interlock signals. And finally, if you cannot establish one of these defenses by a fair preponderance of the evidence, you must pay the penalty for keeping your employes on duty an excessive time."<sup>62</sup>

§ 916. Terms "Casualty," "Unavoidable Accident" and "Act of God" as Used in Section 3 Defined. The term "casualty," found in the proviso of section 3 has been defined as an act which proceeds from an unknown cause or is an unusual effect of a known cause.<sup>63</sup> The phrase 'act of God' has generally been defined as something which occurs exclusively by the violence of nature; at least an act of nature which implies an entire exclusion of all human agencies.<sup>64</sup> In a pioneer opinion under the Hours of Service Act, the meaning of the term "unavoidable accident" was thus discussed:<sup>65</sup> "While some authorities hold that 'unavoidable accident' is synonymous with 'act of God,' the better definition, in the opinion of the court, is that it must be an inevitable accident which could not have been foreseen and prevented by the exercise of that degree of diligence which reasonable men would exercise under like conditions and without any fault attributable to the party sought to be held responsible. In *Clyde v. Richmond & D. R. R. Co.* (C. C.) 59 Fed. 394, it was

62. *United States v. Great Northern R. Co.*, 136 C. C. A. 238, 220 Fed. 630.

63. *Chicago, St. L. & N. O. R. Co. v. Pullman South Car Co.*, 139 U. S. 79, 35 L. Ed. 97, 11 Sup. Ct. 490.

"In the proviso under consideration, 'casualty' means a fortuitous happening caused by some human agency which the carrier cannot control; 'unavoidable accident' means a fortuitous happening caused by some human agency over which the carrier may have

some control, yet which could not have prevented by the exercise of due care; 'act of God' is an accident which could not have been occasioned by human agency, but proceeds from physical causes alone." *United States v. Pennsylvania Co.*, 239 Fed. 761.

64. *The Majestic*, 166 U. S. 375, 41 L. Ed. 1039, 17 Sup. Ct. 597; *Harrison v. Hughes*, 60 C. C. A. 442, 125 Fed. 860.

65. *United States v. Kansas City Southern Ry. Co.*, 189 Fed. 471.

held that 'an unavoidable accident is one which occurs without any apparent cause, at least without fault attributable to any one.' In *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393, it was held that, 'An unavoidable accident is synonymous with inevitable, and means any accident produced by physical causes which are inevitable, such as lightning, storms, perils of the sea, earthquakes, inundations, sudden death or illness.' In *Dixon v. United States*, 1 Brock (U. S.) 177, Fed. Cas. No. 3,934, the court held 'the words "unavoidable accident" must be construed as any accident which renders a breach of the condition inevitable.' This question has been frequently before the courts in the construction of the 28-hour law relating to the transportation of live stock. In *Newport News & Mississippi Valley Co. v. United States*, 61 Fed. 488, 9 C. C. A. 579, Mr. Justice Lurton, then Circuit Judge, delivering the opinion of the court in an action arising under the act of March 3, 1873, c. 252, 17 Stat. 584, digested as section 4386 R. S. (U. S. Comp. St. 1901, p. 2995) said: 'An effect attributable to the negligence of the appellant is not an unavoidable cause. The negligence of the carrier was the cause; the unlawful confinement and unreasonable detention but an effect of that negligence.' The exception in that act was 'unless prevented from so unloading by storm or other accidental cause.' The trial judge in that case had charged the jury in substance: 'That if they found that the live stock had been confined in the cars of the defendant company for a longer period than 28 consecutive hours without unloading for rest, food, and water it would be no defense that such confinement had been caused by an accident to the train due to the negligence of defendant.' This charge was approved by the appellate court as a correct interpretation of the statute. In the later 28-hour law, enacted June 23, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178), the exception reads: 'Unless prevented by storm or by other accidental or unavoidable cause, which cannot be anticipated or avoided by the exercise of due diligence and

foresight.' The construction of this exception by the courts has been uniform that only some unavoidable cause which could not have been guarded against by the exercise of due diligence and foresight is within its meaning. *United States v. Southern Pacific R. R. Co.* (D. C.) 157 Fed. 459; *United States v. A. T. & S. F. Ry. Co.* (D. C.) 166 Fed. 160; *United States v. Union Pacific R. R. Co.*, 169 Fed. 65, 94 C. C. A. 433; *United States v. Atlantic Coast Line*, 173 Fed. 764, 98 C. C. A. 110. Other cases not arising under the 28-hour law, but holding as was held in the case above cited, are *Clyde v. Richmond & D. R. R. Co.* (C. C.) 59 Fed. 394; *The Olympia*, 61 Fed. 120, 9 C. C. A. 393. In *United States v. A., T. & S. F. Ry. Co.*, it was held that, for a carrier to avail itself of a breakdown or wreck as an excuse, it must be shown that the circumstances relied on resulted from a cause which could not have been avoided by the exercise of due diligence and foresight. In *United States v. Atlantic Coast Line* it was held that the failure of a conductor to examine a waybill is not a legal excuse. In *Welles v. Castles*, 69 Mass. 325, it was held the term 'unavoidable accident' has a much more restricted meaning, and comprehends only damage and destruction arising from supervening and uncontrollable forces or accident. Other cases to the same effect are *Dreyer v. People*, 188 Ill. 40, 58 N. E. 620, 59 N. E. 424, 58 L. R. A. 869; *Smith v. Southern Railway Co.*, 129 N. C. 374, 40 S. E. 86; *Tays v. Ecker*, 6 Tex. Civ. App. 188, 24 S. W. 954; *Crystal Springs Distillery Co. v. Cox*, 49 Fed. 556, 1 C. C. A. 365."

**§ 917. High Degree of Diligence Required to Bring Carrier Within Statutory Exceptions.** The Hours of Service Act does not use the words "knowingly" or "willfully" as elements in determining the culpability of the carrier. In this respect the law is not similar to the 28-Hour Live Stock Law,<sup>66</sup> and in order to bring

66. Act of June 29, 1906, 34 Stat. at L. 607.

itself within the proviso in section 3, the carrier must exercise the highest degree of diligence and foresight consistent with the practical operation of its railroad.<sup>67</sup> "We are asked to apply," said Judge Van Valkenburgh, in the case cited, "the rule of construction adopted with respect to the Twenty-Eight Hour Law (Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1911, p. 1341), which was enacted to prevent cruelty to animals by long confinement without rest while in transit by railroad. It is there provided that the carrier shall not confine domestic animals in cars for a longer period than 28 hours, without unloading them for rest, water, and feeding, unless prevented by causes 'which cannot be anticipated or avoided by the exercise of due diligence and foresight.' The carrier is liable for a penalty only when it 'knowingly and willfully' fails to comply with the provisions of the law. This court has held that the words 'knowingly' and 'willfully' are designed to describe the attitude of a carrier, which, having a free will or choice, either intentionally disregards the statute, or is plainly indifferent to its requirements. *St. Louis & S. F. R. Co. v. United States*, 94 C. C. A. 437, 169 Fed. 69; *St. Joseph Stockyards Co. v. United States*, 110 C. C. A. 432, 187 Fed. 104. At all times the carrier has been held to the exercise of due diligence and foresight. The degree of such diligence, foresight, and care required depends largely upon the object aimed at and the situation presented; and whether the defendant has discharged the full duty

67. *United States v. Kansas City Southern R. Co.*, 121 C. C. A. 136, 202 Fed. 828.

"The defense of the carrier in a case like the present one is not complete by showing a delay which was 'the result of a cause not known to the carrier or its officers or agents in charge of such employees at the time said employees left a terminal and which

could not have been foreseen.' The carrier was required to show, in addition thereto, that it exercised a high degree of diligence to overcome the effect of the delay and relieve its employees from continuous service over 16 hours." *Indiana Harbor Belt R. Co. v. United States*, 157 C. C. A. 293, 244 Fed. 943.



laid upon it is to be determined from the facts and circumstances in each case. The act under consideration does not employ the words 'knowingly' and 'willfully.' The carrier is made liable if it requires or permits any employe to be or remain on duty in violation of stated provisions. This case then falls within that class where purposely doing a thing prohibited by statute may amount to an offense, although the act does not involve turpitude or moral wrong. *Armour Packing Co. v. United States*, 82 C. C. A. 135, 153 Fed. 1, 14 L. R. A. (N. S.) 400; s. c., 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681; *Chicago, St. P., M. & O. Ry. Co. v. United States*, 90 C. C. A. 211, 162 Fed. 835. By the terms of the proviso the carrier is excused 'where the delay is the result of a cause not known . . . at the time said employe left a terminal, and which could not have been foreseen.' Not merely which was not foreseen, but which *could not have been* foreseen. The phrase 'by the exercise of due diligence and foresight' is not present. Counsel argue that by leaving out this phrase Congress intended to limit the liability of the carrier; that it meant to imply that what was not foreseen. We cannot assent to this interpretation. Clearly Congress did not intend to relieve the carrier from responsibility in guarding against delays in a matter deemed to be of such importance. By this act it sought to prevent railroad employes from working consecutively longer than the period prescribed, as completely and effectively as could be accomplished by legislation. To bring itself within the exceptions stated, the carrier must be held to as high a degree of diligence and foresight as may be consistent with the object aimed at, and the practical operation of its railroad."<sup>68</sup>

68. The following cases are to the same effect: *Baltimore & O. R. Co. v. United States*, 156 C. C. A. 19, 243 Fed. 153; *United States v. Atchison, T. & S. F. R. Co.*, 236 Fed. 154; *Chicago & N.*

*W. R. Co. v. United States*, 148 C. C. A. 170, 234 Fed. 268; *Atchison, T. & S. F. R. Co. v. United States*, 136 C. C. A. 354, 220 Fed. 748; *United States v. Southern Pac. Co.*, 136 C. C. A. 351, 220 Fed.

§ 918. **Deraillments and Collisions of Trains. Constitute "Casualties" within Meaning of Exemption Clause.** A derailment of a train or a collision, whether due to purely accident causes or to the negligence of the carrier, are casualties within the meaning of section 3, which will justify the retention of train crews at work after the lapse of the statutory period.<sup>69</sup> "This brings us to the question," said Judge Amidon, "whether the derailment was such a 'casualty' as to place the company within the protection of the proviso

745; *San Pedro, L. A. & S. L. R. Co. v. United States*, 136 C. C. A. 343, 220 Fed. 737; *Northern Pac. R. Co. v. United States*, 130 C. C. A. 157, 213 Fed. 577.

69. *Denver & R. G. R. Co. v. United States*, 147 C. C. A. 132, 233 Fed. 62.

"The demoralization of the traffic over the road at the time in question, growing out of the derailment, is clearly shown by the uncontradicted testimony in the case; indeed, it is expressly conceded by counsel for the government that the delay of the crew in question on its regular run from Tacoma to Portland was due to the 'unavoidable accident at South Tacoma.' It is equally plain from the undisputed evidence that the accident was the sole cause why the crew in question was engaged on its run for more than 16 hours without a rest of 8 consecutive hours, so that the question is whether the circumstances of the case bring it within the first proviso to section 3 of the act of Congress, upon which the action is based. Undoubtedly the train dispatcher both at Tacoma and at Portland would, under ordinary conditions, be held to have known that the delay of train

303 at South Tacoma, and the transfer of its crew and passengers to train 314, could not have enabled them to reach Portland in time for the same crew to return to Tacoma on its regular train 308 without being kept on duty for more than 16 hours without a consecutive rest of 8 hours; but the evidence is uncontradicted to the effect (indeed, it could hardly have been otherwise) that both dispatchers were deeply engrossed in arranging and caring for the movement of the large number of trains, including the necessary wrecking outfits, together with the numerous incidentals, necessarily growing out of such a disaster. Under such circumstances, it would not, we think, be reasonable to hold the company liable for their failure to check up the time of service of the various crews of the very numerous trains passing over this particular piece of road at that particular time. And such we think was the view of Congress in providing, as it did, that the act of May 4, 1907, should 'not apply in any case of casualty or unavoidable accident.'" *United States v. Northern Pac. R. Co.*, 131 C. C. A. 372, 215 Fed. 64.

of section 3 of the Hours of Service Act. The stipulation is silent as to the cause of the derailment. There is nothing to show whether it was due to the negligence of the company or its employes, or was an unavoidable accident. Counsel for the government urges that it was incumbent upon the company, in order to bring itself within the proviso, to show that the derailment was not due to its negligence or the negligence of its employes. The trial court adopted that theory. We think this was error. . . . The casualty here is not of the character mentioned in any of the cases above referred to. It was a derailment. That is an event which is not to be anticipated in good railroading. A history of the statute will show that accidents which are of a character to seriously interrupt traffic, and suspend for a considerable time the operation of trains, come within the proviso. As the statute was originally drafted, it simply provided that the carrier should not require or permit any employe to remain on duty more than 16 consecutive hours, 'except when by casualty occurring after such employe has started on his trip, or by unknown casualty occurring after such employe has started on his trip, he is prevented from reaching his terminal.' The report of the committee having the bill in charge, and the debate in the Senate, disclose that the statute was drafted by counsel representing the Brotherhoods of Railroad Trainmen, and it was thought by them that the word 'casualty' alone expressed precisely the meaning intended; that is, an unforeseen accident. Certain senators point out that the term 'casualties' was not a legal term, and they were not sure that it would embrace unavoidable accidents and acts of God. While the bill was pending in the Senate these words were added, not for the purpose of reducing the meaning of the term 'casualty,' but to make certain that the carrier would have the protection of acts of God and unavoidable accidents. At that time the statute did not contain the clause in regard to telegraph operators. When that was added by the House committee, the ex-

ception could not be conveniently embodied in section 2, and for that reason was carried forward and attached as a proviso to section 3. We do not think it was the intent of Congress in case of such serious matters as derailments and collisions to take from the company the protection of the proviso even if such events were caused by the negligence of the company or its employees. On the other hand, it was the intent of the statute in case of such an event to leave the company free to deal with the situation and to retain employees in the service if that result could not be avoided by the exercise of reasonable diligence after the occurrence of the accident. As was pointed out by this court in *United States v. Missouri Pacific Ry. Co.*, 213 Fed. 169, 130 C. C. A. 5, in case of such an accident the first duty of the company is to protect the traveling public and other employees, and if keeping employees on duty overtime is necessary in order to meet the situation the carrier is permitted to do so under the proviso. In the presence of such an event the law does not look to the question how it was brought about; on the other hand, it is chiefly concerned with the protection of those whose lives may be imperiled. The penalties prescribed in the statute are not a punishment for negligence, but for keeping men on duty for excessive periods. The statute clearly recognizes that there may be emergencies justifying such longer period of service. Not to permit it would imperil the traveling public and other employees of the carrier. 'The usual causes incidental to operation' do not come within this class, for the reason that they can usually be anticipated, or their consequences avoided, by the exercise of diligence after they occur. We are of the opinion, therefore, that the derailment involved in these counts brought the company within the scope of the proviso. This would be true, whether it was caused by negligence or was a pure accident. The stipulation of facts clearly shows that the keeping of the men on duty for the excessive time was caused wholly by the derailment, and could not

have been avoided by the exercise of diligence on the part of the company after the derailment occurred. We are of the opinion, therefore, that the trial court erred in directing a verdict in favor of the government as to these counts, and its judgment must be reversed.”

**§ 919. Ordinary Delays Incident to Train Operation not Valid Excuses.** The usual causes of delay incidental to the operation of trains do not alone constitute emergencies or casualties justifying a period of service longer than that fixed by statute.<sup>70</sup> For if the ordinary causes of delay were to excuse the carrier, the statute would be wholly ineffective to accomplish its purpose.<sup>71</sup> The carrier must go further and show that such delays could not have been foreseen and prevented by the exercise of reasonable diligence.<sup>72</sup> It has been uniformly held by the courts that ordinarily delays in starting trains by reason of the fact that another train is late; from side-tracking to give superior trains the right of way, if the meeting of such trains could have been anticipated at the time of leaving the starting point; from getting out of steam or cleaning fires; from defects in equipment; from switching; from time taken for meals; and in short from all the usual causes incidental to operation—are not, standing alone, valid excuses within the meaning of this proviso.<sup>73</sup> “A

70. *Atchison, T. & S. F. R. Co. v. United States*, 155 C. C. A. 644, 243 Fed. 114; *Denver & R. G. R. Co. v. United States*, 147 C. C. A. 132, 233 Fed. 62; *United States v. Lehigh Valley R. Co.*, 135 C. C. A. 282, 219 Fed. 532; *United States v. Chicago & N. W. Ry. Co.*, 219 Fed. 342; *Great Northern R. Co. v. United States*, 134 C. C. A. 98, 218 Fed. 302; *United States v. Kansas City Southern R. Co.*, 121 C. C. A. 136, 202 Fed. 828; *United States v. Kansas City Southern Ry. Co.*, 189 Fed. 471.

71. *United States v. Southern Pac. Co.*, 126 C. C. A. 384, 209 Fed. 562.

72. *Atchison, T. & S. F. R. Co. v. United States*, 244 U. S. 336, 61 L. Ed. 1175, 37 Sup. Ct. 635; *United States v. Kansas City Southern R. Co.*, 121 C. C. A. 136, 202 Fed. 828.

73. *Great Northern R. Co. v. United States*, 134 C. C. A. 98, 218 Fed. 302; *United States v. Kansas City Southern R. Co.*, 121 C. C. A. 136, 202 Fed. 832; *United States v. Kansas City Southern*

carrier must use diligence to anticipate, as this court held in *United States v. Kansas City Southern Railway Co.*, 202 Fed. 828, 121 C. C. A. 136, 'all the usual causes incidental to operation.' And when any casualty occurs the carrier must still use diligence to avoid keeping its employes on duty overtime. Failure to perform either of those duties deprives it of the benefit of the proviso. Poor coal, meeting of trains, switching, defective shaker rod, leaky flues (*United States v. Kansas City Southern Ry. Co.*, 202 Fed. 829, 121 C. C. A. 136), pulled out drawbar, bursted air hose (*United States v. Great Northern Railway Co.*, 220 Fed. 630, 136 C. C. A. 238), extraordinary head wind, heavy grain movement, hot box (*Great Northern Railway Co. v. United States*, 218 Fed. 302, 134 C. C. A. 98, L. R. A. 1915D, 408), high wind, broken tail pin, hot box (*United States v. Lehigh Valley Railroad Co.*, 219 Fed. 532, 135 C. C. A. 282), have been held to be causes of delay 'incidental to operation.' ”

**§ 920. What Constitutes an Emergency Within Operators' Proviso of Section 2.** The statute provides

Ry. Co., 189 Fed. 471; *United States v. Atchison, T. & S. F. Ry. Co.*, 166 Fed. 160.

74. *Denver & R. G. R. Co. v. United States*, 147 C. C. A. 132, 233 Fed. 62.

"There was some time lost by reason of hot boxes, and this it is claimed was an unavoidable accident. It is a matter of universal knowledge that science has not yet been able to discover the means of preventing hot boxes entirely, but a careful examination of them before starting a train and examination at stopping points will reduce accidents of that nature to a minimum. But in no event can it be said that a hot box is an unavoidable or unforeseen accident. The officials of defendant could

reasonably anticipate that hot boxes are likely to occur on every train, more especially on freight trains such as these were, and it was their duty to take that fact, as well as the frequency with which other trains would be met, into consideration in establishing the division or terminal yards and determining the distances for them. If they failed to do so, and by reason of such failure the crews on its trains are required to remain on duty for a longer period than 16 consecutive hours, it is guilty of a violation of this act. *United States v. A., T. & S. F. Ry. Co. (D. C.)*, 166 Fed. 160." *United States v. Kansas City Southern Ry. Co.*, 189 Fed. 471.

that operators employed at night and day stations or at daytime stations, may, in case of emergency, be required to work four additional hours. The emergency contemplated by the statute must be real, and one against which the carrier cannot guard.<sup>75</sup> In holding that the illness of a dispatcher created an emergency within the statute, the court, in defining that term, said: "It does not appear that Congress used the word 'emergency' in any other than its ordinary or popular sense. Webster defines the word 'emergency' as: 'Any event or occasional combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency.' The Century Dictionary defines the word as follows: 'Sudden or unexpected happening; an unforeseen occurrence or condition.' The definition as given by the Century Dictionary was approved in *Sheehan v. City of New York*, 37 Misc. Rep. 432, 75 N. Y. Supp. 802. . . . It is claimed by counsel for the United States, however, that the Company should have had extra train dispatchers, under pay, ready to take the place of Johnson when he became ill. The law recognizes the fact that emergencies may arise. Congress, no doubt, used the word 'emergency' with reference to the business of dispatching trains when conducted in the exercise of the ordinary care required in such business. If Congress had intended that the railroads should provide against all emergencies, then there was no use in granting to the Company the right to require longer hours in the case of emergency. If we decide that it was the duty of the Company to keep extra train dispatchers under pay to take the place of those who became suddenly ill, how many should it have kept in the present case—one or six? And as the extra dispatcher or dispatchers might also have become ill, should not the Company also provide for that contingency? Speaking generally, sickness and death are the common lot of all and must be expected; but, within the expectancy of life, health and not sickness is

75. *United States v. Southern Pac. Co.*, 126 C. C. A. 384, 209 Fed. 562.

the general rule. In view of the showing that for a period of 7 years only one other unexpected absence of an employe on account of illness or other cause had occurred, we think the Company was not so negligent in not having an extra dispatcher on hand to take Johnson's place, as to deprive it of the privilege granted by the law. No question is made as to the necessity of the performance of the work required of the employes mentioned. We do not think the chief train dispatcher was required under the circumstances to perform the work of Johnson, as that would have left the business of the office without superintendence or supervision." While the word "emergency" as used in the statute does not mean an extraordinary emergency as used in some statutes, it does mean more than the ordinary mistakes and negligences which happen in the practical operation of railroads.<sup>76</sup>

**§ 921. Insubordination of Employe may Constitute "Emergency" Within Section 2.** The proviso to section 2 which prescribes that operators, train dispatchers and like employes may remain on duty after the statutory period in cases of emergency for four additional hours in a 24-hour period of not exceeding three days in any week, applies where one dispatcher remained on duty for a period longer than nine hours in a 24-hour period because of the insubordination of another dispatcher, which necessitated his dismissal from the railroad's service.<sup>77</sup> In the case cited, it appeared from the allegations of the defendant's answer that the dispatcher, when called upon to explain the manner in which he had performed his duties shortly prior thereto, exhibited a violent temper, became abusive and

76. *United States v. Missouri Pac. R. Co.*, 156 C. C. A. 466, 244 Fed. 38; *United States v. Denver & R. G. R. Co.*, 147 C. C. A. 132, 233 Fed. 62; *United States v. Baltimore & O. R. Co.*, 226 Fed. 220; *United States v. Denver &*

*R. G. R. Co.*, 136 C. C. A. 275, 220 Fed. 293; *United States v. Chicago & N. W. Ry. Co.*, 219 Fed. 342.

77. *United States v. Denver & R. G. R. Co.*, 136 C. C. A. 275, 220 Fed. 293.



defiant so that it became necessary to dismiss him from the service of the company because of such insubordination and because his retention in the service thereafter would have been inconsistent with discipline and dangerous to the interest of the carrier and the safety of the public. "It is urged," said the court, "that no emergency is shown, because insubordination by an employe is but a violation of the rules of employment, and a railroad company may not create an emergency at will by discharging an employe for infraction of rules, and thus require remaining employes to render extra labor. But in the situation alleged in the answer the railroad company did not create the emergency, but merely acted in one. Under the allegations of the answer that the employe became of violent temper, abusive, insubordinate, and defiant the defendant could have shown that the employe had the power, disposition, and purpose to endanger the safety of those who traveled subject to his care by acts of omission or commission. The primary purpose of the act of Congress was to provide for the safety of those intrusted to the supervision of the employes, from the dangers arising from their lack of attention and misjudgment, owing to fatigue (*Baltimore & Ohio Railroad Co. v. Interstate Commerce Commission*, 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878; *United States v. Missouri Pac. Ry. Co.*, 213 Fed. 169, 130 C. C. A. 5); but the danger from such a source is not greater than arises from the disobedience, willfulness, or malice of employes." In another action, it appeared that a coal-heaver employed by the railroad company as an engine watchman refused to take charge of an engine, without any justification, and the fireman volunteered to meet the emergency and remain on duty for a longer period than that permitted by the statute. It was held that his retention in the service was a casualty within the proviso of section 3.<sup>78</sup>

78. *Denver & R. G. R. Co. v. United States*, 147 C. C. A. 132, 235 Fed. 62.

**§ 922. Burden of Proving Excessive Service to be within Statutory Exception is Upon Carrier.** In all actions against carriers for penalties accruing for violations of the Hours of Service Act, the burden is upon the defendant to show that the causes of excessive service on the part of its employes came within the proviso exempting the carrier from the penalties.<sup>79</sup> The excuses embodied in the proviso are separate and affirmative defenses which must be pleaded in the answer.<sup>80</sup> "The general rule of law which has ordinarily prevailed and become consecrated, almost, as a maxim in the interpretation of statutes, is that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its meaning. In short a proviso carves special exceptions only out of the enacting clause, and those who set up any such exception must establish it as being within the words as well as within the reason thereof."<sup>81</sup>

79. Atchison, T. & S. F. R. Co. v. United States, 155 C. C. A. 644, 243 Fed. 114; Denver & R. G. R. Co. v. United States, 147 C. C. A. 132, 233 Fed. 62; Great Northern R. Co. v. United States, 134 C. C. A. 98, 218 Fed. 302, L. R. A. 1915D 408; United States v. Houston Belt & Terminal R. Co., 125 C. C. A. 481, 205 Fed. 344; Chicago, B. & Q. R. Co. v. United States, 115 C.

C. A. 193, 195 Fed. 241; United States v. Kansas City Southern Ry. Co., 189 Fed. 471.

80. United States v. Kansas City Southern R. Co., 121 C. C. A. 136, 202 Fed. 828; Chicago, B. & Q. R. Co. v. United States, 115 C. C. A. 193, 195 Fed. 241.

81. United States v. Dickson, 15 Pet. 141, 10 L. Ed. 689.

## CHAPTER LII.

### FEDERAL TWENTY-EIGHT HOUR LIVE STOCK LAW.

- Sec. 923. Duties of Interstate Common Carriers in Transporting Live Stock.
- Sec. 924. Time Consumed in Loading and Unloading Live Stock Must not be Considered—Exception as to Sheep.
- Sec. 925. Time May be Extended upon Written Request of Owner.
- Sec. 926. When Carriers are Excused from Complying with Statute.
- Sec. 927. Animals Unloaded Pursuant to Statute may be Fed at Expense of Owner.
- Sec. 928. Penalty for Non-Compliance with 28-Hour Live Stock Law.
- Sec. 929. Statute not Applicable when Animals are Properly Cared For.
- Sec. 930. Penalties may be Recovered by Civil Actions.

§ 923. Duties of Interstate Common Carriers in Transporting Live Stock. Section 1 of the Federal 28-Hour Live Stock Law<sup>1</sup> provides that no railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them whose road forms any part of a line of railroad over which cattle, sheep, swine or other animals shall be conveyed from one state or territory or the District of Columbia into or through any other state or territory or the District of Columbia, or the owners or masters of steam sailing or other vessels carrying or transporting cattle, sheep, swine or other animals from one state or territory or the District of Columbia into or through another state or territory or the District of Columbia shall confine the same in cars, boats or vessels of any description for a period longer than 28 consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours.<sup>2</sup>

1. Act of June 29, 1906, 34 Stat. at L. 607. Appendix L, *infra*.

2. United States v. St. Joseph Stockyards Co., 181 Fed. 625; United States v. Union Pac. R. Co., 94 C. C. A. 433, 169 Ky. 786, 134 Am. St. Rep. 491, 119 S. W. 786.

**§ 924. Time Consumed in Loading and Unloading Live Stock Must not be Considered—Exception as to Sheep.** In estimating the 28-hour period within the meaning of the statute, the time consumed in loading and unloading cannot be considered, but the time during which animals have been confined without rest, food or water on connecting roads must be included, it being the purpose of the Act to prohibit their continuous confinement within the period of 28 hours, except upon the contingencies hereinafter mentioned. A proviso to the statute declares that it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime in case of sheep, the same may continue in transit to a suitable place for unloading subject to the limitation of 36 hours.<sup>3</sup>

**§ 925. Time may be Extended upon Written Request of Owner.** The time of confinement provided in the statute may be extended to 36 hours upon the written request of the owner or the person in custody of a particular shipment of live stock, which written request shall be separate and apart from any printed bill of lading, or other railroad form.<sup>4</sup>

**§ 926. When Carriers are Excused from Complying with Statute.** The carriers subject to the statute are required to comply with the 28-hour provision of the act unless prevented by storm or by other accidental

**Texas.** Panhandle & S. F. Ry. Co. v. Phillips, — Tex. Civ. App. —, 197 S. W. 1031; Texas & P. Ry. Co. v. McMillen, — Tex. Civ. App. —, 183 S. W. 773.

**Utah.** Dee v. San Pedro, L. A. & S. L. R. Co., — Utah —, 167 Pac. 246.

**Virginia.** Chesapeake & O. Ry. Co. v. American Exch. Bank, 92 Va. 495, 44 L. R. A. 449, 23 S. E. 935.

3. Section 1.

4. Mobile & O. R. Co. v. United States, 126 C. C. A. 427, 209 Fed. 605; Webster v. Union Pac. R. Co., 200 Fed. 597; Atchison, T. & S. F. R. Co. v. United States, 101 C. C. A. 140, 178 Fed. 12; United States v. Pere Marquette R. Co., 171 Fed. 586; United States v. Atchison, T. & S. F. Ry. Co., 166 Fed. 160; Durrett v. Chicago, R. I. & P. R. Co., 20 N. M. 114, 146 Pac. 962.

or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight.<sup>5</sup>

**§ 927. Animals Unloaded Pursuant to Statute may be Fed at Expense of Owner.** It is provided in section 2 of the statute that animals unloaded pursuant to the provisions thereof shall be properly fed and watered during such rest either by the owner or persons having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them or by the owners or masters of vessels transporting the same at the reasonable expense of the owner or person in custody thereof. Such carriers shall, in such case, have a lien upon the animals for food, care and custody furnished, collectible at the destination point in the same manner as the transportation charges are collected. The carrier shall not be liable for any detention of any such animals, when such detention is of reasonable duration to enable compliance with the statute. Nothing in the act shall be construed to prevent the owner or shipper of animals from furnishing food therefor if he so desires.

**§ 928. Penalty for Non-compliance with 28-hour Live Stock Law.** Every railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or the master or owner of any steam, sailing or other vessel who knowingly and willfully fails to comply with the provisions of the first two sections of the live stock law,

5. United States v. Chicago, St. P., M. & O. Ry. Co., 245 Fed. 179; Grand Trunk R. Co. v. United States, 143 C. C. A. 392, 229 Fed. 116; Chicago, B. & Q. R. Co. v. United States, 114 C. C. A. 334, 194 Fed. 342; United States v. Atchison, T. & S. F. Ry. Co., 166 Fed.

160; United States v. Sioux City Stock Yards Co., 162 Fed. 556; Chicago, B. & Q. R. Co. v. Slaterly, 76 Neb. 721, 124 Am. St. Rep. 825, 107 N. W. 1045; Chesapeake & O. Ry. Co. v. American Exch. Bank, 92 Va. 495, 44 L. R. A. 449, 23 S. E. 935.

shall for every such failure be liable for a forfeit and pay a penalty of not less than \$100 nor more than \$500.<sup>6</sup>

**§ 929. Statute not Applicable when Animals are Properly Cared For.** The provisions of the statute requiring live stock to be unloaded do not apply when animals are carried in cars, boats or other vessels in which they can and do have proper food, water, space and opportunity to rest.<sup>7</sup>

**§ 930. Penalties may be Recovered by Civil Actions.** Section 4 of the act provides that the penalty created by the statute shall be recovered by civil action in the name of the United States in the district court within the district where the violation may have been committed or the person or corporation resides or carries on business. It is the duty of United States attorneys to prosecute all violations of the act reported by the Secretary of Agriculture, or which come to their notice or knowledge by other means.

6. United States v. Chicago, St. P., M. & O. R. Co., 245 Fed. 179; United States v. Philadelphia & R. Ry. Co., 238 Fed. 428; Grand Trunk R. Co. v. United States, 143 C. C. A. 392, 229 Fed. 116; United States v. Philadelphia & R. Ry. Co., 223 Fed. 213; United States v. Chicago Junct. Ry. Co., 211 Fed. 724; Oregon-Washington R. & Nav. Co. v. United States, 123 C. C. A. 471, 205 Fed. 337; Chicago, B. & Q. R. Co. v.

United States, 114 C. C. A. 334, 194 Fed. 342; St. Joseph Stockyards Co. v. United States, 110 C. C. A. 432, 187 Fed. 104; St. Louis & S. F. R. Co. v. United States, 94 C. C. A. 437, 169 Fed. 69; Baltimore & O. S. W. R. Co. v. J. A. Wood & Co., 130 Ky. 839, 114 S. W. 734.  
7. Northern Pac. Ry. Co. v. Finch, 225 Fed. 676; Erie R. Co. v. United States, 118 C. C. A. 558, 200 Fed. 406.

## CHAPTER LIII.

### FEDERAL BOILER INSPECTION ACT.

- Sec. 931. Railroads and Employes Subject to Boiler Inspection Act.
- Sec. 932. Duties and Obligations of Carriers Under Boiler Inspection Act.
- Sec. 933. President Authorized to Appoint Chief Inspectors of Locomotive Boilers.
- Sec. 934. Fifty Boiler Inspection Districts Created with One Inspector for Each.
- Sec. 935. Duties of District Inspectors in the Enforcement of Statute and Rules Thereunder.
- Sec. 936. Carrier May Appeal from Decision of Inspector as to Condition of Locomotive.
- Sec. 937. Rules and Regulations for Inspection of Locomotive Boilers Required to be Adopted and Enforced.
- Sec. 938. Nature of Duty Created by Boiler Inspection Act.
- Sec. 939. Reports of Accidents Affecting Locomotive Boilers, to be Filed by Carriers, When.
- Sec. 940. Commission May Publish Reports of Investigation of Accidents.
- Sec. 941. Reports of Investigations not to be Used in Damage Suits.
- Sec. 942. Penalties for Violation of Statute.
- Sec. 943. Terms "Railroad" and "Employes" Within Statute Defined.
- Sec. 944. Sworn Reports of Inspection by Carriers must be Filed.
- Sec. 945. Chief Inspector Required to Make Annual Report to Interstate Commerce Commission.
- Sec. 946. Amendment of 1915 to Boiler Inspection Act Extending Statute to all Parts of Locomotives.
- Sec. 947. State Laws Regulating Headlights Superseded by Amendment of 1915.

**§ 931. Railroads and Employes Subject to Boiler Inspection Act.** The provisions of the Federal Boiler Inspection Act apply to all common carriers, their officers, agents and employes, engaged in the transportation of passengers, and property by railroad in the District of Columbia, in any territory of the United States or from one state or territory of the United States or the District of Columbia, or any other state or territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States  
(1491)

through a foreign country to any other place in the United States.<sup>1</sup>

**§ 932. Duties and Obligations of Carriers Under Boiler Inspection Act.** The Boiler Inspection Act declares that it shall be unlawful for any common carrier, its officers or agents subject to the provisions thereof, to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb and that all boilers shall be inspected from time to time in accordance with the provisions of the statute, and be able to withstand such test or tests as may be prescribed in the rules and regulations made pursuant to the provisions of the statute.<sup>2</sup>

**§ 933. President Authorized to Appoint Chief Inspectors of Locomotive Boilers.** Under the provisions of section 3 of the act, the President is authorized by and with the advice and consent of the Senate, to appoint a chief inspector and two assistant chief inspectors of locomotive boilers. They must be selected with reference to their practical knowledge of the construction and repairing of boilers, and to their fitness and ability to systematize and carry into effect the provisions of the statute relative to the inspection and maintenance of locomotive boilers. The act requires the office of the chief inspector to be maintained at Washington, D. C., and the Interstate Commerce Commission is required to provide such stenographic and clerical help as the business of the offices of the chief inspector and his assistants may require. These three inspectors have general superintendence of the other inspectors provided for in the statute. They are required to direct them in the duties imposed by the act and to see

1. Section 1, Appendix J, *infra*.      2. Section 2.



that all the requirements of the statute and the rules, regulations and instructions made or given thereunder, are observed by common carriers subject thereto. The chief inspector receives a salary of \$4,000 per year and the assistant chief inspectors receive a salary of \$3,000 per year; and each of the three are paid traveling expenses incurred in the performance of his duties.<sup>3</sup>

**§ 934. Fifty Boiler Inspection Districts Created With One Inspector for Each.** After his appointment, the chief inspector is required by the provisions of Section 4 to divide the territory comprising the several states into fifty locomotive boiler inspection districts so arranged that the service of the inspector appointed for each district shall be most effective, and so that the work required of each inspector shall be substantially the same. The Interstate Commerce Commission is authorized to appoint fifty inspectors of locomotive boilers who shall be in the classified civil service, and shall be appointed after competitive examination according to the laws and rules of the Civil Service Commission. The chief inspector shall assign one inspector so appointed to each of the districts hereinbefore named. Each inspector receives a salary of \$1,800 per year and his traveling expenses while engaged in the performance of his duty. He receives in addition thereto an annual allowance for office rent, stationery, and clerical assistance, to be fixed by the Interstate Commission, but not to exceed in the case of any district inspector \$600 per year. In order to obtain the most competent inspectors, the statute makes it the duty of the chief inspector to prepare a list of questions to be propounded to applicants with respect to the construction, repair, operation, testing and inspection of locomotive, boilers, and their practical experience in such work, which list, after being approved by the Interstate Commerce Commission, shall be used by the Civil Ser-

3. Section 3.

vice Commission as a part of its examination. A person interested, either directly or indirectly, in any patented article required to be used on any locomotive under supervision or who is intemperate in his habits shall be eligible to hold the office of either chief inspector or assistant or district inspector.<sup>4</sup>

**§ 935. Duties of District Inspectors in the Enforcement of Statute and Rules Thereunder.** Section 6 of the act declares that it shall be the duty of each inspector to become familiar, so far as practicable, with the condition of each locomotive boiler ordinarily housed or repaired in his district. If any locomotive is ordinarily housed or required in two or more districts, then the chief inspector or an assistant shall make such division between inspectors as will avoid the necessity for duplication of work. Each inspector is required to make such personal inspection of the locomotive boilers under his care from time to time as may be necessary to fully carry out the provisions of the act, and as may be consistent with his other duties; but he is not required to make such inspection at stated times or at regular intervals. His first duty under the statute is to see that the carriers make inspections in accordance with the rules and regulations established or approved by the Interstate Commerce Commission, and that carriers repair the defects which such inspections disclose before the boiler or boilers or appurtenances pertaining thereto are again put in service.

**§ 936. Carrier May Appeal from Decision of Inspector as to Condition of Locomotive.** Whenever any district inspector shall, in the performance of his duty, find any locomotive boiler or apparatus pertaining thereto not conforming to the requirements of the law or the rules and regulations established and approved as provided in section 5, he shall notify the carrier in writing that the locomotive is not in a serviceable condition and thereafter such boiler shall not be used

until in a serviceable condition. But a carrier, when notified by an inspector in writing that a locomotive boiler is not in serviceable condition because of defects set out and described in said notice, may, within five days after receiving the notice, appeal to the chief inspector by telegraph or by letter to have the boiler reexamined, and upon receipt of the appeal from the inspector's decision, the chief inspector shall assign one of the assistant chief inspectors or any district inspector other than the one from whose decision the appeal is taken, to reexamine and inspect the boiler within fifteen days from the date of notice. If, upon such reexamination, the boiler is found to be in serviceable condition, the chief inspector is required to immediately notify the carrier in writing and the boiler may then be put in service without further delay; but if the reexamination of the boiler sustains the decision of the district inspector, the chief inspector is required to notify the carrier at once that the appeal is dismissed, and upon receipt of such notice, the carrier may, within thirty days, appeal to the Interstate Commerce Commission, and upon such appeal, and after hearing, the Commission shall have the power to revise, modify or set aside such action of the chief inspector and declare the locomotive to be in serviceable condition and authorize the same to be operated. Pending an appeal as hereinbefore provided, the requirements of the inspector shall be effective.<sup>5</sup>

**§ 937. Rules and Regulations for Inspection of Locomotive Boilers Required to be Adopted and Enforced.** Each carrier subject to the act was required to file with the chief inspector within three months after the approval of the statute, rules and regulations for the inspection of locomotive boilers which, after hearing and approval by the Interstate Commerce Commission, with such modification as the Commission requires, became obligatory upon such carrier. If, however, any carrier subject to the statute fail to

file rules and instructions, the chief inspector is required to prepare rules and instructions for the inspection of locomotive boilers, to be observed by such carrier, which rules and instructions, when approved by the Interstate Commerce Commission, and served upon the carrier, became obligatory. A proviso to section 5 prescribed that such common carrier may from time to time change the rules and regulations provided for, but such change shall not take effect until the new rules and regulations shall have been filed with and approved by the Interstate Commerce Commission.

**§ 938. Nature of Duty Created by Boiler Inspection Act.** The supreme court of appeals of Virginia held that the Boiler Inspection Act did not impose upon the carrier the absolute duty to provide and maintain the appliances therein mentioned at all times and under all circumstances in proper condition. In this respect the court found that the statute was different from the Safety Appliance Act.<sup>6</sup> "It will be observed," said the court, "that the safety appliances considered in the foregoing and analogous cases, either work automatically, as couplers which operate by impact, or else are simply contrivances, as draw bars and the like, which are the objects rather than the subjects of action, and when once placed in position remain intact and discharge their functions until changed by some active agency. A locomotive engine, on the other hand, however perfect its condition may be, in its operation calls for the continuous exercise of a high degree of skill and experience, and the constant supervision and attention of the engineer. In other words, the two classes of instrumentalities are so inherently diverse in character and use that rules which would be reasonable and appropriate in respect to the one class would be impossible of practical application to the other. The avowed object of the Boiler Act, it is true, is to promote the safety of employes and travelers, and to that end

6. *Virginian Ry. Co. v. Andrews' Adm'x*, 113 Va. 482, 87 S. E. 577.

section 2 declares that from and after July 1, 1911, it shall be unlawful for any common carrier to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put; that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life and limb. When, therefore, the carrier has discharged his statutory duty to the engineer by turning over to him a locomotive engine and boiler and appurtenances in proper condition and safe to operate, it is not answerable to the engineer as an insurer of his safety throughout the run; and, in order for his personal representative to maintain an action for his death caused by the explosion of the boiler, the burden rests upon the plaintiff to show that the defendant has been guilty of the negligence charged in the declaration."

**§ 939. Reports of Accidents Affecting Locomotive Boilers, to be Filed by Carriers, When.** In case of an accident resulting from any cause to a locomotive boiler or its appurtenances causing serious injury or death to one or more persons, the carrier owning or operating such locomotive is required to make a statement forthwith in writing of the fact of such accident to the chief inspector. The chief inspector or one of his assistants or such inspector as he may designate is then required to investigate the facts concerning such accident. When the locomotive is disabled to the extent that it cannot be run by its own steam, the carrier is required to preserve the part or parts affected by the accident so far as possible without hinderance or interference to traffic until after the inspection. The inspector making the investigation shall examine or cause to be examined thoroughly the boiler or the part affected, making full and detailed report of the cause of the accident to the chief inspector.'

**§ 940. Commission May Publish Reports of Investigation of Accidents.** The Interstate Commerce Commission is authorized at any time to call upon the chief inspector for a report of any accident embraced within the statute, and upon receipt of said report, if it deems it to the public interest, make reports of such investigation, stating the cause of the accident, together with such recommendations as it deems proper. Such reports shall be made public in such manner as the Commission deems proper.<sup>8</sup>

**§ 941. Reports of Investigation not to be Used in Damage Suits.** The Act provides that no report of any accident required to be made under the statute or any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in the report or investigation.<sup>9</sup>

**§ 942. Penalties for Violation of Statute.** All common carriers violating the provisions of the Boiler Inspection Act, or any rule or regulation made thereunder, or any lawful order of any inspector, shall be liable to a penalty of One Hundred Dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed. The statute declares it to be the duty of such attorneys, subject to the direction of the attorney general, to bring such suits upon duly verified information being lodged with them respectively, of such violations having occurred. The act makes it the duty of the chief inspector of locomotive boilers to give information to the proper United States attorney of all violations of the statute coming to his knowledge.

**§ 943. Terms "Railroad" and "Employes" Within Statute Defined.** The term "railroad," used in the

8. Section 8.

9. Section 8.

Boiler Inspection Act, includes all the roads in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease. The term "employees," as used in the Act, includes persons actually engaged in or connected with the movement of any train.<sup>10</sup>

**§ 944. Sworn Reports of Inspection by Carriers must be Filed.** Every carrier subject to the Boiler Inspection Act is required to file with the district inspector, under the oath of the proper officer or employé, a duplicate of the report of each inspector required by the rules and regulations promulgated under the statute, and shall also file with such inspector, under the oath of the proper officer or employé, a report showing the repair of the defects disclosed by the inspection.

**§ 945. Chief Inspector Required to Make Annual Report to Interstate Commerce Commission.** Section 7 of the act requires the chief inspector to make an annual report to the Interstate Commerce Commission of the work done during the year, and shall therein make such recommendations for the betterment of the service as he may desire.

**§ 946. Amendment of 1915 to Boiler Inspection Act Extending Statute to all Parts of Locomotives.** An amendment to the Boiler Inspection Act, approved March 4, 1915,<sup>11</sup> provides that section 2 of the act shall apply to and include the entire locomotive and tender and all parts and appurtenances thereof. It is further provided in the amendatory act that the chief inspector and the two assistant chief inspectors, together with all the district inspectors appointed under the original statute, shall inspect and shall have the same powers and duties with respect to all the parts or appurtenances of the locomotive and tender that they theretofore had with respect to the boiler of a locomotive and the appurtenances thereof and the original act shall apply

10. Section 1.

11. 38 Stat. at L. 1192, Appendix J, *infra*.

to and include the entire locomotive and tender and all parts thereof with the same force and effect as it then applied to locomotive boilers and their appurtenances. A further provision of the amendatory act declared that all inspectors and applicants for position of inspector shall be reexamined touching their classifications and fitness with respect to the additional duties imposed by the amendatory statute. Section 3 of the act of 1915 provided that nothing therein should be held to alter, amend, change, repeal or modify any other act of Congress than the Boiler Inspection Act, or any order of the Interstate Commerce Commission promulgated under the Safety Appliance Act.

**§ 947. State Laws Regulating Headlights Superseded by Amendment of 1915.** The federal Supreme Court on June 8, 1914 held that the enactment of the federal Boiler Inspection Act did not provide for the regulation of locomotive headlights and therefore, in the absence of national legislation or regulation, state laws requiring headlights were valid even as to interstate trains.<sup>12</sup> But the amendment of 1915 to the Boiler Inspection Act specifically provides that all the provisions of the original statute shall apply to and include the entire locomotive and all parts thereof. The effect, therefore, of the amendment is to render nugatory all state laws regulating headlights on interstate engines. Such was the conclusion of the Court of Appeals of Alabama in construing the amendment of 1915.<sup>13</sup> "Viewing the amendatory Act of Congress of March 4, 1915," said the court, "and the objects obviously designed to be attained, namely, the safety of interstate commerce, and all those who are employed in its movement, we cannot escape the conclusion that Congress had thereby so manifested a clear intent to occupy the field with respect to the entire equipment of locomotives engaged in interstate commerce, and every

12. Atlantic Coast Line R. Co. v. State, 234 U. S. 280, 58 L. Ed. 1312, 34 Sup. Ct. 329.

13. Louisville & N. R. Co. v. State, — Ala. —, 76 So. 505.



part thereof, as to exclude the right of the state, and that upon its approval, and irrespective of what may have been done by the commission thereunder, it was in effect a caveat or warning to the states. The important fact that the commission had not made any specific rule, with respect to headlights on locomotives, of the entire equipment of which it had assumed general supervision—its silence on the subject—may well be taken as an indication that existing conditions, up to the time it did promulgate such rules under and by virtue of the authority conferred by said act, were deemed by the commission satisfactory. That was merely one of the details of a broad and general subject, which details seem to have been given attention after proper tests and investigation had been made. See orders and rules promulgated by the Interstate Commerce Commission of June 6 and December 26, 1916, relating to headlights required to be used on locomotives.”

## CHAPTER LIV.

### FEDERAL ASH PAN ACT.

Sec. 948. Federal Ash Pan Act.

Sec. 949. Penalties for Violation of the Act.

Sec. 950. Duties of Interstate Commerce Commission.

Sec. 951. Receivers are Common Carriers within the Act.

Sec. 952. Statute not Applicable to Electric Locomotives.

§ 948. **Federal Ash Pan Act.** A federal statute approved May 30, 1908,<sup>1</sup> known as the Ash Pan Act, provides that it shall be unlawful for any common carrier engaged in interstate or foreign commerce by railroad to use any locomotive in moving interstate or foreign traffic, not equipped with an ash pan, which can be dumped or emptied and cleaned without the necessity of any employe going under such locomotive. Section 2 of the act makes the same requirement of all common carriers by railroad in any territory of the United States or the District of Columbia.

§ 949. **Penalties for Violation of the Act.** Section 3 of the Ash Pan Act declares that any such common carrier using any locomotive in violation of any of the provisions of the act, shall be liable to a penalty of Two Hundred Dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed. The district attorney is required to bring such suits upon duly verified information being lodged with him of such violation having occurred.

§ 950. **Duties of Interstate Commerce Commission.** The act declares it to be the duty of the Interstate Commerce Commission to lodge with the proper district attorney information of any violation as may come to

1. 35 Stat. at L. 476, Appendix M, *infra*.

its knowledge. Section 4 provides that it shall be the duty of the Interstate Commerce Commission to enforce the provisions of the act, and all powers theretofore granted to the Commission are extended to it for the purpose of enforcing the Ash Pan Act.

**§ 951. Receivers are Common Carriers within the Act.** Section 5 of the act provides that the term "common carrier" shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

**§ 952. Statute not Applicable to Electric Locomotives.** It is provided by section 6 of the act that nothing in the provisions thereof shall apply to any locomotive upon which, by reason of the use of oil, electricity, or other such agency, an ash pan is not necessary.

## CHAPTER LV.

### FEDERAL ACCIDENT REPORTS ACT.

- Sec. 953. Duties of Common Carriers under Federal Accident Reports Act.
- Sec. 954. Terms "Interstate Commerce" and "Foreign Commerce" Within Statute Defined.
- Sec. 955. Penalty for Failure to Make Such Reports Within Thirty Days After End of Each Month.
- Sec. 956. Interstate Commerce Commission Authorized to Investigate all Collisions, Derailments, etc. m
- Sec. 957. Reports of such Investigations may be Published but may not be Used in Damage Suits.

**§ 953. Duties of Common Carriers under Federal Accident Reports Act.** The Federal Accident Reports Act, approved May 6, 1910 provides that it shall be the duty of the general manager, superintendent or other proper officer of every common carrier engaged in interstate or foreign commerce by railroad to make to the Interstate Commerce Commission, at its office in Washington, D. C. a monthly report, under oath, of all collisions, derailments, or other accidents resulting in injury to persons, equipment, or roadbed arising from the operation of such railroad under such rules and regulations as may be prescribed by the Commission, which report shall state the nature and causes thereof and the circumstances connected therewith.<sup>1</sup>

**§ 954. Terms "Interstate Commerce" and "Foreign Commerce" Within Statute Defined.** The term "interstate commerce" as used in the Accident Reports Act includes transportation from any state or territory or the District of Columbia to any other state or territory or the District of Columbia. The term "foreign commerce" as used in the act includes transportation from any state or territory or the District of Columbia to any foreign country, and from any foreign

1. Section 1, Federal Accident Reports Act, Appendix N.

country, to any state or territory or the District of Columbia.

**§ 955. Penalty for Failure to Make Such Reports Within Thirty Days After End of Each Month.** If any common carrier fails to make such report within thirty days after the end of any month, it shall be deemed guilty of a misdemeanor, and upon conviction thereof by a court of competent jurisdiction, shall be punished by a fine of not more than One Hundred Dollars for each and every offense and for every day during which it shall fail to make such report after the time specified for making the same.<sup>2</sup>

**§ 956. Interstate Commerce Commission Authorized to Investigate all Collisions, Derailments, etc.** Section 3 of the Accident Reports Act provides that the Interstate Commerce Commission shall have authority to investigate all collisions, derailments, or other accidents resulting in serious injury to person or to the property of a railroad occurring on the line of any common carrier engaged in interstate or foreign commerce by railroad. The Commission or any impartial investigator authorized by the Commission, has authority to investigate such collisions, derailments, or other accidents, and all the attending facts, conditions and circumstances, and, for that purpose, may subpoena witnesses, administer oaths, take testimony, and require the production of books, papers, orders, memoranda, exhibits, and other evidence and shall be provided by said carriers with all reasonable facilities. But if an accident is investigated by a commission of a state in which it occurred, the Interstate Commerce Commission shall, if convenient, make any investigation it may have previously determined upon, at the same time as, and in connection with, the state commission investigation.

**§ 957. Reports of such Investigations may be Published but may not be Used in Damage Suits.**

2. Section 2.

The Commission is authorized under the statute when it deems it to the public interest, to make reports of such investigations, stating the cause of the accident, together with such recommendations as it deems proper. Such reports shall be made public in such manner as the Commission deems proper. The Commission is authorized to prescribe for the carriers a method and form of making the reports required.<sup>3</sup> Section 4 of the act provides that neither said report nor any report of said investigation nor any part thereof, shall be deemed as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in the report or investigation.

3. Section 5.

## CHAPTER LVI.

### THE ADAMSON LAW.

- Sec. 958. Eight Hours shall be Deemed Day's Work for Purpose of Reckoning Compensation of Interstate Employees.
- Sec. 959. Railroads and Employes Excepted from the Provisions of the Statute.
- Sec. 960. President Empowered to Appoint Commission to Observe Operation and Effect of Eight Hour Wage Law.
- Sec. 961. Wages of Railway Employes Subject to Statute not to be Reduced Pending Report of Commission.
- Sec. 962. Penalty for Violation of the Adamson Act.
- Sec. 963. Adamson Act a Valid Exercise of Power of Congress Under Commerce Clause.

**§ 958. Eight Hours shall be Deemed Day's Work for Purpose of Reckoning Compensation of Interstate Employes.** The Act of Congress known as the Adamson Act, approved Sept. 3, 1916<sup>1</sup> provides that eight hours shall, in contracts for labor service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for service of all employes employed by any common carrier by railroad, subject to the provisions of the Interstate Commerce Act as amended, and who are actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads from any state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from one place in a territory to another place in the same territory or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States.<sup>2</sup>

**§ 959. Railroads and Employes Excepted from the Provisions of the Statute.** The Adamson Act does not

1. 39 Stat. at L. 721.

2. Section 1 of the Adamson Act, Appendix O, *infra*.

apply to railroads independently owned and operated not exceeding 100 miles in length, electric street railroads and electric interurban railroads or their employes even when engaged in interstate and foreign commerce. But railroads, though less than 100 miles in length, whose principal business is leasing or furnishing terminal or transfer facilities to other railroads, or are themselves engaged in transfers of freight between railroads or between railroads and industrial plants as well as their employes engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads in interstate and foreign commerce, are within the terms of the statute.<sup>3</sup>

**§ 960. President Empowered to Appoint Commission to Observe Operation and Effect of Eight Hour Wage Law.** Section 2 of the Adamson Act provides that the President shall appoint a commission of three, which shall observe the operation and effect of the institution of the eight hour standard work day as defined in section 1 of the statute, and the facts and conditions affecting the relations between the carriers and the employes during a period of not less than six months nor more than nine months in the discretion of the commission, and, within thirty days thereafter, such commission shall report its finding to the President and Congress. Each member of the Commission shall receive such compensation as may be fixed by the President.<sup>4</sup>

**§ 961. Wages of Railway Employes Subject to Statute not to be Reduced Pending Report of Commission.** It is provided in section 3 of the Act that pending the report of the commission mentioned in the foregoing paragraph, and for a period of thirty days thereafter, the compensation of railway employes subject to the act for a standard eight hour work day shall not be reduced below the standard in effect at the time of the enactment of the statute, and it is further

3. Section 1.

4. Section 2.



provided that for all necessary time in excess of eight hours such employes shall be paid at the rate not less than pro rata rate for such standard eight hour work-day.

**§ 962. Penalty for Violation of the Adamson Act.** Section 4 of the act provides that any person violating any of the provisions of the act shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than \$100 nor more than \$1,000, or imprisoned not to exceed one year or both.

**§ 963. Adamson Act a valid Exercise of Power of Congress Under Commerce Clause.** In *Wilson v. New*,<sup>b</sup> the federal Supreme Court held that the Adamson Act was valid and a proper exercise of the power of Congress under the Commerce clause.<sup>c</sup>

5. 243 U. S. 332, 61 L. Ed. 755, 938, Ann. Cas. 1918A 1024.  
37 Sup. Ct. 298, L. R. A. 1917E      6. See Section 14, *supra*.



# APPENDIXES



# APPENDIXES

## APPENDIX A.

### THE ACT TO REGULATE COMMERCE AS AMENDED.

Sec. 1. That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country; *Provided, however,* That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid.

The term "common carrier" as used in this Act shall include express companies and sleeping car companies. The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary

in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto.

All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid; or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: *Provided*, That messages by telegraph, telephone, or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: *And provided further*, That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services.

And it is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every such unjust and unreasonable classification, regulation, and practice with reference to commerce between the States and with foreign countries is prohibited and declared to be unlawful.

No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary care takers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, custom inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *And provided further*, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this Act: *Provided further*, That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any persons other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled "An Act to further regulate commerce with

foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and any amendment thereof.

From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

Sec. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreason-



able preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Every common carrier subject to the provisions of this Act shall, according to their respective powers, afforded all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter or for a longer distance: *Provided, however,* That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided further,* That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

Sec. 5. That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide

between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the Act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The Commission may on its own motion or the application of any shipper institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the Commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said Commission shall be final.

If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the Act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation: *Provided*, Any application for extension under the terms of this provision filed with the Interstate Commerce Commission prior to July first, nineteen hundred and fourteen, but for any reason not

heard and disposed of before said date, may be considered and granted thereafter.

No vessel permitted to engage in the coastwise or foreign trade of the United States shall be permitted to enter or pass through said canal if such ship is owned, chartered, operated, or controlled by any person or company which is doing business in violation of the provisions of the Act of Congress approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," or the provisions of sections seventy-three to seventy-seven, both inclusive, of an Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," or the provisions of any other Act of Congress amending or supplementing the said Act of July second, eighteen hundred and ninety, commonly known as the Sherman Antitrust Act, and amendments thereto, or said sections of the Act of August twenty-seventh, eighteen hundred and ninety-four. The question of fact may be determined by the judgment of any court of the United States of competent jurisdiction in any cause pending before it to which the owners or operators of such ship are parties. Suit may be brought by any shipper or by the Attorney General of the United States.

Sec. 6. That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

Any common carrier subject to the provisions of this Act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this Act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

Every common carrier subject to this Act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act to which it may be a party.

The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient.

No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different

compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privilege or facilities in the transportation of passengers or property, except such as are specified in such tariffs: *Provided*, That wherever the word "carrier" occurs in this Act it shall be held to mean "common carrier."

That in time of war or threatened war preference and precedence shall, upon the demand of the President of the United States, be given over all other traffic for the transportation of troops and materials of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. And in time of peace shipments consigned to agents of the United States for its use shall be delivered by the carriers as promptly as possible and without regard to any embargo that may have been declared, and no such embargo shall apply to shipments so consigned.

The Commission may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Commission shall be void and its use shall be unlawful.

In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with the terms of any regulation adopted and promulgated or any order made by the Commission under the provisions of this section, such carrier, receiver, or trustee shall be liable to a penalty of five hundred dollars for each such offense, and twenty-five dollars for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

If any common carrier subject to the provisions of this Act, after written request made upon the agent of such carrier hereinafter in this section referred to, by any person or company for a written statement of the rate or charge applicable to a described shipment between stated places under the schedules or tariffs to which such carrier is a party, shall refuse or omit to give such written statement within a reasonable time, or shall misstate in writing the applicable rate, and if the person or company making such request suffers damage in consequence of such refusal or omission or in consequence of the misstatement of the rate, either through making the shipment over a line or route for which the proper rate is higher than the rate over another available line or route, or through entering into any sale or other contract whereunder such person or company obligates himself or itself to make such shipment of freight at his or its cost, then the said carrier shall be liable to a penalty of two hundred and fifty dollars, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

It shall be the duty of every carrier by railroad to keep at all times conspicuously posted in every station where freight is received for transportation the name of an agent resident in the city, village, or town where such station is located, to whom application may be made for the information by this section required to be furnished on written request; and in case any carrier shall fail at any time to have such name so posted in any station, it shall be sufficient to address such request in substantially the following form: "The Station Agent of the \_\_\_\_\_ Company at \_\_\_\_\_ Station," together with the name of the proper post office, inserting the name of the carrier company and of the station in the blanks, and to serve the same by depositing the request so addressed, with postage thereon prepaid, at any post office.

When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

(a) To establish physical connection between the lines of the rail carrier and the dock of the water carrier by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of its right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a spur track or tracks to the dock. This provision shall only apply where such connection is reasonably practicable, can be made with safety to the public, and where the amount of business to be handled is sufficient to justify the outlay.

The Commission shall have full authority to determine the terms and conditions upon which these connecting tracks, when constructed, shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier. The provisions of this paragraph shall extend to cases where the dock is owned by other parties than the carrier involved.

(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

(c) To establish maximum proportional rates by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

(d) If any rail carrier subject to the Act to regulate commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country.

The orders of the Interstate Commerce Commission relating to this section shall only be made upon formal complaint or in proceedings instituted by the Commission of its own motion and after full hearing. The orders provided for in the two amendments to the Act to regulate commerce enacted in this section shall be served in the same manner and enforced by the same penalties and proceedings as are the orders of the Commission made under the provisions of section fifteen of the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten, and they may be conditioned for the payment of any sum or the giving of security for the payment of any sum or the discharge of any obligation which may be required by the terms of said order.

Sec. 7. That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this Act.

Sec. 8. That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the cost in this case.

Sec. 9. That every person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United

States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Sec. 10. That any common carrier subject to the provisions of this Act, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this Act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this Act for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be any unlawful discrimination in rates, fares, or charges for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

Any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and wilfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars,



or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

Any person, corporation, or company, or any agent or officer thereof, who shall deliver property for transportation to any common carrier subject to the provisions of this Act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent, or officer, obtain or attempt to obtain transportation for such property at less than the regular rates then established and in force on the line of transportation; or who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false statement or representation as to cost, value, nature, or extent of injury, or by the use of any false bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to be false, fictitious, or fraudulent, or to contain any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, refund, or payment for damage or otherwise in connection with or growing out of the transportation of or agreement to transport such property, whether with or without the consent or connivance of the carrier, whereby the compensation of such carrier for such transportation, either before or after payment, shall in fact be made less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was wholly or in part committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court: *Provided*, That the penalty of imprisonment shall not apply to artificial persons.

If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this Act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such per-

son, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom.

Sec. 11. That a Commission is hereby created and established to be known as the Interstate Commerce Commission, which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners first appointed under this Act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, Anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired time of the Commissioner whom he shall succeed. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this Act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission.

Sec. 12. That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this Act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this Act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience

to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witness and the production of books, papers, and documents under the provisions of this section.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this Act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

Witnesses whose depositions are taken pursuant to this Act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

Sec. 13. That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing Society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry on, its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provisions of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Sec. 14. That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party

who may have complained, and to any common carrier that may have been complained of.

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports.

Sec. 15. That whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this Act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of this Act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this Act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed. All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction. Whenever the carrier or carriers in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof the Commission may, after hearing, make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order.

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice had become effective: Provided, That if any such hearing can not be concluded within the period of suspension, as above stated, the Interstate Commerce Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At any hearing involving a rate increased after January first, nineteen hundred and ten, or of a rate sought to be increased after the passage of this Act, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

The Commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the divisions of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line. The Commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character nor shall the Commission have the right to establish any route, classification, rate, fare, or charge when the transportation is wholly by water, and any

transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water.

And in establishing such through route, the Commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established.

In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this Act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this Act provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport such property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however,* That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through lines or route his freight shall be transported.

It shall be unlawful for any common carrier subject to the provisions of this Act, or any officer, agent, or employee of such common carrier, or for any other person or corporation lawfully authorized by such common carrier to receive information therefrom, knowingly to disclose to or permit to be acquired by any person or corporation other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for interstate transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person or corporation to solicit or knowingly receive any such information which may be so used: *Provided,* That nothing in this Act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any state or federal court,

or to any officer or agent of the Government of the United States, or of any State or Territory, in the exercise of his powers or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime; or information given by a common carrier to another carrier or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

Any person, corporation, or association violating any of the provisions of the next preceding paragraph of this section shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not more than one thousand dollars.

If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act.

Sec. 16. That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the commission within two



years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court or state court within one year from the date of the order, and not after.

In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff.

Every order of the Commission shall be forthwith served upon the designated agent of the carrier in the city of Washington or in such other manner as may be provided by law.

The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of section fifteen of this Act shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

The forfeiture provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for and represent the Commission in any case pending in

the Commerce Court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the Commerce Court for the enforcement of such order. If, after hearing, that Court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the Court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

The copies of schedules and classifications and tariffs of rates, fares, and charges, and of all contracts, agreements, and arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers made to the Commission as required under the provisions of this Act shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as *prima facie* evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of and extracts from any of said schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the secretary, under the Commission's seal, shall be received in evidence with like effect as the originals.

Sec. 16a. That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order.

Sec. 17. That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business

and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said Commission shall have an official seal, which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations and sign subpoenas.

Sec. 18. That each Commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the judges of the courts of the United States. The Commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars, payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties. Until otherwise provided by law, the Commission may hire suitable offices for its use, and shall have authority to procure all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission.

Sec. 19. That the principal office of the Commission shall be in the city of Washington, where its general sessions shall be held; but whenever the convenience of the public or the parties may be promoted, or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this Act.

Sec. 19a. That the Commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. To enable the Commission to make such investigation and report, it is authorized to employ such experts and other assistants as may be necessary. The Commission may appoint examiners who shall have power to administer oaths, examine witnesses, and take testimony. The Commission shall make an inventory which shall list the property

of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

First. In such investigation said Commission shall ascertain and report in detail as to each piece of property owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. The Commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value, and each of the foregoing cost values.

Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

Third. Such investigation and report shall show separately the property held for purposes other than those of a common carrier, and the original cost and present value of the same, together with an analysis of the methods of valuation employed.

Fourth. In ascertaining the original cost to date of the property of such common carrier the Commission, in addition to such other elements as it may deem necessary, shall investigate and report upon the history and organization of the present and of any previous corporation operating such property; upon any increases or decreases of stocks, bonds, or other securities, in any reorganization; upon moneys received by any such corporation by reason of any issues of stocks, bonds, or other securities; upon the syndicating, banking, and other financial arrangements under which such issues were made and the expense thereof; and upon the net and gross earnings of such corporations; and shall also ascertain and report in such detail as may be determined by the Commission upon the expenditure of all moneys and the purposes for which the same were expended.

Fifth. The Commission shall ascertain and report the amount and value of any aid, gift, grant of right of way, or donation, made to any such common carrier, or to any previous corporation operating such property, by the Government of the United States or by any State, county, or municipal government, or by individuals, associations, or corporations; and it shall also ascertain and report the grants of land to any such common carrier, or any previous corporation operating such property, by the Government of the United States, or by any State, county, or municipal government, and the amount of

money derived from the sale of any portion of such grants and the value of the unsold portion thereof at the time acquired and at the present time, also, the amount and value of any concession and allowance made by such common carrier to the Government of the United States, or to any State, county, or municipal government in consideration of such aid, gift, grant, or donation.

Except as herein otherwise provided, the Commission shall have power to prescribe the method of procedure to be followed in the conduct of the investigation, the form in which the results of the valuation shall be submitted, and the classification of the elements that constitute the ascertained value, and such investigation shall show the value of the property of every common carrier as a whole and separately the value of its property in each of the several States and Territories and the District of Columbia, classified and in detail as herein required.

Such investigation shall be commenced within sixty days after the approval of this Act and shall be prosecuted with diligence and thoroughness, and the result thereof reported to Congress at the beginning of each regular session thereafter until completed.

Every common carrier subject to the provisions of this Act shall furnish to the Commission or its agents from time to time and as the Commission may require maps, profiles, contracts, reports of engineers, and any other documents, records, and papers, or copies of any or all of the same, in aid of such investigation and determination of the value of the property of said common carrier, and shall grant to all agents of the Commission free access to its right of way, its property, and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and every common carrier is hereby directed and required to cooperate with and aid the Commission in the work of the valuation of its property in such further particulars and to such extent as the Commission may require and direct, and all rules and regulations made by the Commission for the purpose of administering the provisions of this section and section twenty of this Act shall have the full force and effect of law. Unless otherwise ordered by the Commission; with the reasons therefor, the records and data of the Commission shall be open to the inspection and examination of the public.

Upon the completion of the valuation herein provided for the Commission shall thereafter in like manner keep itself informed of all extensions and improvements or other changes in the condition and value of the property of all common carriers, and shall ascertain the value thereof, and shall from time to time, revise and correct its valuations, showing such revision and correction classified and as a whole and separately in each of the several States and Territories and the District of Columbia, which valuations, both original and corrected, shall be tentative valuations and shall be reported to Congress at the beginning of each regular session.

To enable the Commission to make such changes and corrections in its valuations of each class of property, every common carrier sub-

ject to the provisions of this Act shall make such reports and furnish such information as the Commission may require.

Whenever the Commission shall have completed the tentative valuation of the property of any common carrier, as herein directed, and before such valuation shall become final, the Commission shall give notice by registered letter to the said carrier, the Attorney General of the United States, the governor of any State in which the property so valued is located, and to such additional parties as the Commission may prescribe, stating the valuation placed upon the several classes of property of said carrier, and shall allow thirty days in which to file a protest of the same with the Commission. If no protest is filed within thirty days, said valuation shall become final as of the date thereof.

If notice of protest is filed the Commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented in support of any such protest so filed as aforesaid. If after hearing any protest of such tentative valuation under the provisions of this Act the Commission shall be of the opinion that its valuation should not become final, it shall make such changes as may be necessary, and shall issue an order making such corrected tentative valuation final as of the date thereof. All final valuations by the Commission and the classification thereof shall be published and shall be prima facie evidence of the value of the property in all proceedings under the Act to regulate commerce as of the date of the fixing thereof, and in all judicial proceedings for the enforcement of the Act approved February fourth, eighteen hundred and eighty-seven, commonly known as "the Act to regulate commerce," and the various Acts amendatory thereof, and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission.

If upon the trial of any action involving a final value fixed by the Commission, evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the Commission, or additional thereto and substantially affecting said value, the court, before proceeding to render judgment shall transmit a copy of such evidence to the Commission, and shall stay further proceedings in said action for such time as the court shall determine from the date of such transmission. Upon the receipt of such evidence the Commission shall consider the same and may fix a final value different from the one fixed in the first instance, and may alter, modify, amend or rescind any order which it has made involving said final value, and shall report its action thereon to said court within the time fixed by the court. If the Commission shall alter, modify, or amend its order, such altered, modified or amended order shall take the place of the original order complained of and judgment shall be rendered thereon as though made by the Commission in the first instance. If the original order shall not be rescinded or

changed by the Commission, judgment shall be rendered upon such original order.

The provisions of this section shall apply to receivers of carriers and operating trustees. In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with all the requirements of this section and in the manner prescribed by the Commission such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in section sixteen of the Act to regulate commerce.

That the district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this section by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of this section.

It shall be the duty of every common carrier by railroad whose property is being valued under the Act of March first, nineteen hundred and thirteen, to transport the engineers, field parties, and other employees of the United States who are actually engaged in making surveys and other examinations of the physical property of said carrier necessary to execute said Act from point to point on said railroad as may be reasonably required by them in the actual discharge of their duties; and, also, to move from point to point and store at such points as may be reasonably required the cars of the United States which are being used to house and maintain said employees; and, also, to carry the supplies necessary to maintain said employees and the other property of the United States actually used on said railroad in said work of valuation. The service above required shall be regarded as a special service and shall be rendered under such forms and regulations and for such reasonable compensation as may be prescribed by the Interstate Commerce Commission and as will insure an accurate record and account of the service rendered by the railroad, and such evidence of transportation, bills of lading, and so forth, shall be furnished to the Commission as may from time to time be required by the Commission.

Sec. 20. That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions from which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the

salaries paid each class; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, or on the thirty-first day of December in each year if the Commission by order substitute that period for the year ending June thirtieth, and shall be made out under oath and filed with the Commission at its office in Washington within three months after the close of the year for which the report is made, unless additional time be granted in any case by the Commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such party shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the Commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce; and such periodical or special reports shall be under oath whenever the Commission so requires; and if any such carrier shall fail to make and file any such periodical or special report within the time fixed by the Commission, it shall be subject to the forfeitures last above provided.

Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this Act.

The oath required by this section may be taken before any person authorized to administer an oath by the laws of the State in which the same is taken.

The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act including the accounts, records, and memoranda of the movement of traffic as well as the receipts and ex-



penditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees.

In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act.

Any person who shall willfully make false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment: *Provided*, That the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both.

That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to

regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them.

And to carry out and give effect to the provisions of said Acts, or any of them, the Commission is hereby authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence.

That any common carrier, railroad, or transportation company subject to the provisions of this Act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: *Provided, however*, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary live stock, received for transportation concerning which the carrier

shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the values so declared or released, and shall not, so far as relates to values, be held to be a violation of section ten of this Act to regulate commerce, as amended; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the values so declared or agreed upon; and the Commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary live stock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further*, That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years; *Provided, further*, That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.

That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.

No suit brought in any State court of competent jurisdiction against a railroad company, or other corporation, or person, engaged in and carrying on the business of a common carrier, to recover damages for delay, loss of, or injury to property received for transportation by such common carrier under section twenty of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended June twenty-ninth, nineteen hundred and six, April thirteenth, nineteen hundred and eight, February twenty-fifth, nineteen hundred and nine, and June eighteenth, nineteen hundred and ten, shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of \$3,000.

Sec. 21. That the Commission shall on or before the first day of December in each year, make a report, which shall be transmitted to Congress, and copies of which shall be distributed as are the other reports transmitted to Congress. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary; and the names and compensation of the persons employed by said Commission.

Sec. 22. That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets: nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; (\* \* \* nothing in the Act \* \* \* shall be construed to prohibit any common carrier from giving reduced rates for members of National Guard organizations traveling to and from joint encampments with the Regular Army.—39 Stat. L., 646); and nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this Act: *Provided further*, That nothing in this Act shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provisions of this Act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage that may be carried under mileage tickets of the same manner as common carriers are required to do with regard to other joint rates by section six of this Act; and all the provisions of said section six relating to joint rates, fares, and charges shall be

observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the time. The provisions of section ten of this Act shall apply to any violation of the requirements of this proviso.

Sec. 23. That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the Act to which this is a supplement and all Acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: *Provided*, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: *Provided*, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this Act or the Act to which it is a supplement.

Sec. 24. That the Interstate Commerce Commission is hereby enlarged so as to consist of seven members with terms of seven years, and each shall receive ten thousand dollars compensation annually. The qualifications of the Commissioners and the manner of the payment of their salaries shall be as already provided by law. Such enlargement of the Commission shall be accomplished through appointment by the President, by and with the advice and consent of the Senate, of two additional Interstate Commerce Commissioners, one for a term expiring December thirty-first, nineteen hundred and eleven, one for a term expiring December thirty-first, nineteen hundred and twelve. The terms of the present Commissioners, or of any successor appointed to fill a vacancy caused by the death or resignation of any of the present Commissioners, shall expire as heretofore provided by law. Their successors and the successors of the additional Commissioners herein provided for shall be appointed for the full terms of seven years, except that any person appointed to fill a vacancy shall be ap-

pointed only for the unexpired term of the Commissioner whom he shall succeed. Not more than four Commissioners shall be appointed from the same political party.

(Additional provisions in Act of June 29, 1906.) (Sec. 9.) That all existing laws relating to the attendance of witnesses and the production of evidence and the compelling of testimony under the Act to regulate commerce and all Acts amendatory thereof shall apply to any and all proceedings and hearings under this Act.

(Sec. 10.) That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed; but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law.

(Sec. 11.) That this Act shall take effect and be in force from and after its passage.

Joint resolution of June 30, 1906, provides: "That the Act entitled 'An Act to amend an Act entitled "An Act to regulate Commerce," approved February 4, 1887, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission,' shall take effect and be in force sixty days after its approval by the President of the United States."

(Additional provisions in Act of June 18, 1910.) (Sec. 6, par. 2.) It shall be the duty of every common carrier subject to the provisions of this Act, within sixty days after the taking effect of this Act, to designate in writing an agent in the city of Washington, District of Columbia, upon whom service of all notices and processes may be made for and on behalf of said common carrier in any proceeding or suit pending before the Interstate Commerce Commission or before said Commerce Court, and to file such designation in the office of the secretary of the Interstate Commerce Commission, which designation may from time to time be changed by like writing similarly filed; and thereupon service of all notices and processes may be made upon such common carrier by leaving a copy thereof with such designated agent at his office or usual place of residence in the city of Washington, with like effect as if made personally upon such common carrier, and in default of such designation of such agent, service of any notice or other process in any proceeding before said Interstate Commerce Commission or Commerce Court may be made by posting such notice or process in the office of the secretary of the Interstate Commerce Commission.

(Sec. 15.) That nothing in this Act contained shall undo or impair any proceedings heretofore taken by or before the Interstate Commerce Commission or any of the acts of said Commission; and in any cases, proceedings, or matters now pending before it, the Commission may exercise any of the powers hereby conferred upon it, as would be proper in cases, proceedings, or matters hereafter initiated and nothing in this Act contained shall operate to release or affect any obligation, liability, penalty, or forfeiture heretofore existing against or incurred by any persons, corporation, or association.

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(Sec. 18.) That this Act shall take effect and be in force from and after the expiration of sixty days after its passage, except as to sections twelve and sixteen, which sections shall take effect and be in force immediately.

An Act To amend an Act entitled "An Act to Regulate Commerce," as amended, in respect of car service, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section one of the Act entitled "An Act to regulate commerce," approved February twenty-fourth, eighteen hundred and eighty-seven, as heretofore amended, is further amended by adding thereto the following:

The term "car service" as used in this Act shall include the movement, distribution, exchange, interchange, and return of cars used in the transportation of property by any carrier subject to the provisions of this Act.

It shall be the duty of every such carrier to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service, and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

The Interstate Commerce Commission is hereby authorized by general or special orders to require all carriers subject to the provisions of the Act, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the commission may, in its discretion, direct that the said rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation and be subject to any or all of the provisions of the Act relating thereto.

The commission shall, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service, including the classification of cars, compensation to be paid for the use of any car not owned by any such common carrier and the penalties or other sanctions for nonobservance of such rules.

Whenever the commission shall be of opinion that necessity exists for immediate action with respect to the supply or use of cars for transportation of property, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the commission may determine, to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the commission, and also authority to make such just and reasonable directions with respect to car service during such time as in its opinion will best promote car service in the interest of the public and the commerce of the people.

The directions of the commission as to car service may be made through and by such agents or agencies as the commission shall designate and appoint for that purpose.

In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with any direction or order with respect to car service, such carrier, receiver, or trustee shall be liable to a penalty of not less than \$100 nor more than \$500 for each such offense and \$50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

Approved, May 29, 1917.

An Act To amend the Act to regulate commerce, as amended, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section twenty-four of an Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as amended, be further amended to read as follows:

"Sec. 24. That the Interstate Commerce Commission is hereby enlarged so as to consist of nine members, with terms of seven years, and each shall receive \$10,000 compensation annually. The qualifications of the members and the manner of the payment of their salaries shall be as already provided by law. Such enlargement of the commission shall be accomplished through appointment by the President, by and with the advice and consent of the Senate, of two additional Interstate Commerce Commissioners, one for a term expiring December thirty-first, nineteen hundred and twenty-one; and one for a term expiring December thirty-first, nineteen hundred and twenty-two. The terms of the present commissioners, or of any successor appointed to fill a vacancy caused by the death or resignation of any of the present commissioners, shall expire as heretofore provided by law. Their successors and the successors of the additional commissioners herein provided for shall be appointed for the full term of seven years, except that any person appointed to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. Not more than five commissioners shall be appointed from the same political party."

Sec. 2. That section seventeen of said Act, as amended, be further amended to read as follows:

"Sec. 17. That the commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. The commission shall have an official seal, which shall be judicially noticed. Any member of the commission may administer oaths and affirmations and sign subpoenas. A majority of the commission shall constitute a quorum for the transaction of business, except as may be otherwise herein provided, but no commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. The commission may, from time to time, make or amend such general rules or orders as may be requisite for the order



and regulation of proceedings before it, or before any division of the commission, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before the commission or any division thereof and be heard in person or by attorney. Every vote and official act of the commission, or of any division thereof, shall be entered of record, and its proceedings shall be public upon the request of any party interested.

"The commission is hereby authorized by its order to divide the members thereof into as many divisions as it may deem necessary, which may be changed from time to time. Such divisions shall be denominated, respectively, division one, division two, and so forth. Any commissioner may be assigned to and may serve upon such division or divisions as the commission may direct, and the senior in service of the commissioners constituting any of said divisions shall act as chairman thereof. In case of vacancy in any division, or of absence or inability to serve thereon of any commissioner thereto assigned, the chairman of the commission, or any commissioner designated by him for that purpose, may temporarily serve on said division until the commission shall otherwise order.

"The commission may by order direct that any of its work, business, or functions arising under this Act, or under any Act amendatory thereof, or supplemental thereto, or under any amendment which may be made to any of said Acts, or under any other Act or joint resolution which has been or may hereafter be approved, or in respect of any matter which has been or may be referred to the commission by Congress or by either branch thereof, be assigned or referred to any of said divisions for action thereon, and may by order at any time amend, modify, supplement, or rescind any such direction. All such orders shall take effect forthwith and remain in effect until otherwise ordered by the commission.

"In conformity with and subject to the order or orders of the commission in the premises, each division so constituted shall have power and authority by a majority thereof to hear and determine, order, certify, report, or otherwise act as to any of said work, business, or functions so assigned or referred to it for action by the commission, and in respect thereof the division shall have all the jurisdiction and powers now or then conferred by law upon the commission, and be subject to the same duties and obligations. Any order, decision, or report made or other action taken by any of said divisions in respect of any matters so assigned or referred to it shall have the same force and effect, and may be made, evidenced, and enforced in the same manner as if made, or taken by the commission, subject to rehearing by the commission, as provided in section sixteen—a hereof for rehearing cases decided by the commission. The secretary and seal of the commission shall be the secretary and seal of each division thereof.

"In all proceedings before any such divisions relating to the reasonableness of rates or to alleged discriminations not less than three

members shall participate in the consideration and decision; and in all proceedings relating to the valuation of railway property under the Act entitled 'An Act to amend an Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, by providing for a valuation of the several classes of property of carriers subject thereto and securing information concerning their stocks, bonds, and other securities,' approved March first, nineteen hundred and thirteen, not less than five members shall participate in the consideration and decision.

"The salary of the secretary of the commission shall be \$5,000 per annum.

"Nothing in this section contained or done pursuant thereto, shall be deemed to divest the commission of any of its powers."

Sec. 3. So much of section eighteen of the Act to regulate commerce as fixes the salary of the secretary of the commission is hereby repealed.

Sec. 4. That paragraph two, section fifteen, of the Act to regulate commerce approved February fourth, eighteen hundred and eighty-seven, as amended, be further amended by adding the following: "*Provided further*, until January first, nineteen hundred and twenty, no increased rate, fare, charge, or classification shall be filed except after approval thereof has been secured from the commission. Such approval may, in the discretion of the commission, be given without formal hearing, and in such case shall not affect any subsequent proceeding relative to such rate, fare, charge, or classification."

Approved, August 9, 1917.

An Act to Amend the Act to regulate commerce, as amended, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section one of the act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, be further amended by adding thereto the following:

"That on and after the approval of this Act any person or persons who shall, during the war in which the United States is now engaged knowingly and willfully, by physical force or intimidation by threats of physical force obstruct or retard, or aid in obstructing or retarding, the orderly conduct or movement in the United States of interstate or foreign commerce, or the orderly make-up or movement or disposition of any train; or the movement or disposition of any locomotive, car, or other vehicle on any railroad or elsewhere in the United States engaged in interstate or foreign commerce shall be deemed guilty of a misdemeanor, and for every such offense shall be punishable by a fine of not exceeding \$100 or by imprisonment for not exceeding six months, or by both such fine and imprisonment; and the President of the United States is hereby authorized, whenever in his judgment the public interest requires, to employ the armed forces of the United States to prevent any such obstruction or retardation of the passage of the mail, or of the orderly conduct or movement of interstate or foreign

commerce in any part of the United States, or of any train, locomotive, car, or other vehicle upon any railroad or elsewhere in the United States engaged in interstate or foreign commerce: *Provided*, That nothing in this section shall be construed to repeal, modify, or affect either section six or section twenty of an Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October fifteenth, nineteen hundred and fourteen.

"That during the continuance of the war in which the United States is now engaged the President is authorized, if he finds it necessary for the national defense and security, to direct that such traffic or such shipments of commodities as, in his judgment, may be essential to the national defense and security shall have preference or priority in transportation by any common carrier by railroad, water, or otherwise. He may give these directions at and for such times as he may determine, and may modify, change, suspend, or annul them and for any such purpose he is hereby authorized to issue orders direct, or through such person or persons as he may designate for the purpose or through the Interstate Commerce Commission. Officials of the United States, when so designated, shall receive no compensation for their services rendered hereunder. Persons not in the employ of the United States as designated shall receive such compensation as the President may fix. Suitable offices may be rented and all necessary expenses, including compensation of persons so designated, shall be paid as directed by the President out of funds which may have been or may be provided to meet expenditures for the national security and defense. The common carriers subject to the Act to regulate commerce or as many of them as desire so to do are hereby authorized without responsibility or liability on the part of the United States, financial or otherwise, to establish and maintain in the city of Washington during the period of the war an agency empowered by such carriers as join in the arrangement to receive on behalf of them all notice and service of such orders and directions as may be issued in accordance with this Act, and service upon such agency shall be good service as to all the carriers joining in the establishment thereof. And it shall be the duty of any and all the officers, agents, or employees of such carriers by railroad or water or otherwise to obey strictly and conform promptly to such orders, and failure knowingly and willfully to comply therewith, or to do or perform whatever is necessary to the prompt execution of such order, shall render such officers, agents, or employees guilty of a misdemeanor, and any such officer, agent or employee shall, upon conviction, be fined not more than \$5,000, or imprisoned not more than one year, or both, in the discretion of the court. For the transportation of persons or property in carrying out the orders and directions of the President, just and reasonable rates shall be fixed by the Interstate Commerce Commission; and if the transportation be for the Government of the United States, it shall be paid for currently or monthly by the Secretary of the Treasury out of any funds not otherwise appropriated. Any carrier complying

with any such order or direction for preference or priority herein authorized shall be exempt from any and all provisions in existing law imposing civil or criminal pains, penalties, obligations, or liabilities upon carriers by reason of giving preference or priority in compliance with such order or direction."

Approved, August 10, 1917.

## APPENDIX B.

### THE ELKINS ACT.

AN ACT to further regulate commerce with foreign nations and among the States.

Sec. 1. That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same

manner as if the offense had been actually and wholly committed therein.

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this Act, shall in addition to any penalty provided by this Act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

Sec. 2. That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may

be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

Sec. 3. That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this Act shall not preclude the bringing of suit for the recovery of damages by any party injured or any other action provided by said Act approved February fourth, eighteen hundred and eighty-seven, entitled "An Act to regulate commerce" and the Acts amendatory thereof. And in proceedings under this Act and the Acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding: *Provided*, That the provisions of an Act entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' ap-

proved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three," shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission.

Sec. 4. That all Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed, but such repeal shall not affect causes now pending nor rights which have already accrued, but such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law and as modified by the provisions of this Act.

Sec. 5. That this Act shall take effect from its passage.



## APPENDIX C.

### FEDERAL BILL OF LADING ACT.

AN ACT relating to bills of lading in interstate and foreign commerce.

Sec. 1. That bills of lading issued by any common carrier for the transportation of goods in any Territory of the United States, or the District of Columbia, or from a place in a State to a place in a foreign country, or from a place in one State to a place in another State, or from a place in one State to a place in the same State through another State or foreign country, shall be governed by this act.

Sec. 2. That a bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill.

Sec. 3. That a bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is an order bill. Any provision in such a bill or in any notice, contract, rule, regulation, or tariff that it is nonnegotiable shall be null and void and shall not affect its negotiability within the meaning of this act unless upon its face and in writing agreed to by the shipper.

Sec. 4. That order bills issued in a State for the transportation of goods to any place in the United States on the Continent of North America, except Alaska and Panama, shall not be issued in parts or sets. If so issued, the carrier issuing them shall be liable for failure to deliver the goods described therein to anyone who purchases a part for value in good faith, even though the purchase be after the delivery of the goods by the carrier to a holder of one of the other parts: *Provided, however,* That nothing contained in this section shall be interpreted or construed to forbid the issuing of order bills in parts or sets for such transportation of goods to Alaska, Panama, Porto Rico, the Philippines, Hawaii, or foreign countries, or to impose the liabilities set forth in this section for so doing.

Sec. 5. That when more than one order bill is issued in a State for the same goods to be transported to any place in the United States on the Continent of North America, except Alaska and Panama, the word "duplicate," or some other word or words indicating that the document is not an original bill, shall be placed plainly upon the face of every such bill except the one first issued. A carrier shall be liable for the damage caused by his failure so to do to anyone who has purchased the bill for value in good faith as an original, even though the purchase be after the delivery of the goods by the carrier to the holder of the original bill: *Provided, however,* That nothing contained in this section shall in such case for such transportation of goods to Alaska, Panama, Porto Rico, the Philippines, Hawaii, or foreign countries be interpreted or construed so as to require the placing of the word "duplicate" thereon, or to impose the liabilities set forth in this section for failure so to do.

Sec. 6. That a straight bill shall have placed plainly upon its face by the carrier issuing it "nonnegotiable" or "not negotiable."

This section shall not apply, however, to memoranda or acknowledgments of an informal character.

Sec. 7. That the insertion in an order bill of the name of a person to be notified of the arrival of the goods shall not limit the negotiability of the bill or constitute notice to a purchaser thereof of any rights or equities of such person in the goods.

Sec. 8. That a carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods or, if the bill is an order bill, by the holder thereof, if such a demand is accompanied by—

(a) An offer in good faith to satisfy the carrier's lawful lien upon the goods;

(b) Possession of the bill of lading and an offer in good faith to surrender, properly indorsed, the bill which was issued for the goods, if the bill is an order bill; and

(c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure.

Sec. 9. That a carrier is justified, subject to the provisions of the three following sections in delivering goods to one who is—

(a) A person lawfully entitled to the possession of the goods, or

(b) The consignee named in a straight bill for the goods, or

(c) A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been indorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee.

Sec. 10. That where the carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to anyone having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such request or information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods.

Sec. 11. That except as provided in section twenty-six, and except when compelled by legal process, if a carrier delivers goods for which an order bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto.

Sec. 12. That except as provided in section twenty-six, and except when compelled by legal process, if a carrier delivers part of the goods for which an order bill had been issued and fails either—

(a) To take up and cancel the bill, or

(b) To place plainly upon it a statement that a portion of the goods has been delivered with a description which may be in general terms either of the goods or packages that have been so delivered or of the goods or packages which still remain in the carrier's possession, he shall be liable for failure to deliver all the goods specified in the bill to anyone who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto.

Sec. 13. That any alteration, addition, or erasure in a bill after its issue without authority from the carrier issuing the same, either in writing or noted in the bill, shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor.

Sec. 14. That where an order bill has been lost, stolen, or destroyed a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss, theft, or destruction and upon the giving of a bond, with sufficient surety, to be approved by the court, to protect the carrier or any person injured by such delivery from any liability or loss incurred by reason of the original bill remaining outstanding. The court may also in its discretion order the payment of the carrier's reasonable costs and counsel fees: *Provided*, a voluntary indemnifying bond without order of court shall be binding on the parties thereto.

The delivery of the goods under an order of the court, as provided in this section, shall not relieve the carrier from liability to a person to whom the order bill has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.

Sec. 15. That a bill, upon the face of which the word "duplicate" or some other word or words indicating that the document is not an original bill is placed, plainly shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an accurate copy of an original bill properly issued, but no other liability.

Sec. 16. That no title to goods or right to their possession asserted by a carrier for his own benefit shall excuse him from lia-

bility for refusing to deliver the goods according to the terms of a bill issued for them, unless such title or right is derived directly or indirectly from transfer made by the consignor or consignee after the shipment, or from the carrier's lien.

Sec. 17. That if more than one person claim the title or possession of goods, the carrier may require all known claimants to interplead, either as a defense to an action brought against him for nondelivery of the goods or as an original suit, whichever is appropriate.

Sec. 18. That if some one other than the consignee or the person in possession of the bill has a claim to the title or possession of the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods, either to the consignee or person in possession of the bill or to the adverse claimant, until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead.

Sec. 19. That except as provided in the two preceding sections and in section nine, no right or title of a third person, unless enforced by legal process, shall be a defense to an action brought by the consignee of a straight bill or by the holder of an order bill against the carrier for failure to deliver the goods on demand.

Sec. 20. That when goods are loaded by a carrier such carrier shall count the packages of goods, if package freight, and ascertain the kind and quantity of bulk freight, and such carrier shall not, in such cases, insert in the bill of lading or in any notice, receipt, contract, rule, regulation, or tariff, "Shipper's weight, load, and count," or other words of like purport, indicating that the goods were loaded by the shipper and the description of them made by him or in case of bulk freight and freight not concealed by packages the description made by him. If so inserted, contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein.

Sec. 21. That when package freight or bulk freight is loaded by a shipper and the goods are described in a bill of lading merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill of lading that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill of lading, such statements, if true, shall not make liable the carrier issuing the bill of lading, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may also by inserting in the bill of lading the words "Shipper's weight, load, and count," or other words of like purport indicate that the goods were loaded by the shipper and

the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill of lading: *Provided, however,* Where the shipper of bulk freight installs and maintains adequate facilities for weighing such freight, and the same are available to the carrier, then the carrier, upon written request of such shipper and when given a reasonable opportunity so to do, shall ascertain the kind and quantity of bulk freight within a reasonable time after such written request, and the carriers shall not in such cases insert in the bill of lading the words "Shipper's weight," or other words of like purport, and if so inserted contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein.

Sec. 22. That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several States and with foreign nations, the carrier shall be liable to (a) the owner of goods covered by a straight bill subject to existing right of stoppage in transitu or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the nonreceipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue.

Sec. 23. That if goods are delivered to a carrier by the owner or by a person whose act in conveying the title to them to a purchaser for value in good faith would bind the owner, and an order bill is issued for them, they can not thereafter, while in the possession of the carrier, be attached by garnishment or otherwise or be levied upon under an execution unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered to him or impounded by the court.

Sec. 24. That a creditor whose debtor is the owner of an order bill shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such bill or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which can not readily be attached or levied upon by ordinary legal process.

Sec. 25. That if an order bill is issued the carrier shall have a lien on the goods therein mentioned for all charges on those goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill and all other charges incurred in transportation and delivery, unless the bill expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so

far as they are followed by law and the contract between the consignor and the carrier.

Sec. 26. That after goods have been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the carrier shall not thereafter be liable for failure to deliver the goods themselves to the consignee or owner of the goods, or to a holder of the bill given for the goods when they were shipped, even if such bill be an order bill.

Sec. 27. That an order bill may be negotiated by delivery where, by the terms of the bill, the carrier undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the bill has indorsed it in blank.

Sec. 28. That an order bill may be negotiated by the indorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such indorsement may be in blank or to a specified person. If indorsed to a specified person, it may be negotiated against by the indorsement of such person in blank or to another specified person. Subsequent negotiation may be made in like manner.

Sec. 29. That a bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby. A straight bill can not be negotiated free from existing equities, and the indorsement of such a bill gives the transferee no additional right.

Sec. 30. That an order bill may be negotiated by any person in possession of the same, however such possession may have been acquired, if by the terms of the bill the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery.

Sec. 31. That a person to whom an order bill has been duly negotiated acquires thereby—

(a) Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value; and

(b) The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him.

Sec. 32. That a person to whom a bill has been transferred, but not negotiated, acquires thereby, as against the transferor the title to the goods, subject to the terms of any agreement with the transferor. If the bill is a straight bill such person also acquires the right to notify the carrier of the transfer to him of such bill and thereby to become the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before the notification.

Prior to the notification of the carrier by the transferor or transferee of a straight bill the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferor, or by a notification to the carrier by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

A carrier has not received notification within the meaning of this section unless an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a notification, has been notified; and no notification shall be effective until the officer or agent to whom it is given has had time, with the exercise of reasonable diligence, to communicate with the agent or agents having actual possession or control of the goods:

Sec. 33. That where an order bill is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the bill unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced.

Sec. 34. That a person who negotiates or transfers for value a bill by indorsement or delivery, unless a contrary intention appears, warrants—

- (a) That the bill is genuine;
- (b) That he has a legal right to transfer it;
- (c) That he has knowledge of no fact which would impair the validity or worth of the bill;
- (d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied if the contract of the parties had been to transfer without a bill the goods represented thereby.

Sec. 35. That the indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorsers of the bill to fulfill their respective obligations.

Sec. 36. That a mortgagee or pledgee or other holder of a bill for security who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt or from any other person, shall not be deemed by so doing to represent or warrant the genuineness of such bill or the quantity or quality of the goods therein described.

Sec. 37. That the validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress, loss, theft, or conversion, if the person to whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value therefor in good faith, without notice

of the breach of duty, or fraud, accident, mistake, duress, loss, theft, or conversion.

Sec. 38. That where a person, having sold, mortgaged or pledged goods which are in a carrier's possession and for which an order bill has been issued, or having sold, mortgaged, or pledged the order bill representing such goods, continues in possession of the order bill, the subsequent negotiation thereof by that person under any sale, pledge, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiation.

Sec. 39. That where an order bill has been issued for goods no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage in transitu. Nor shall the carrier be obliged to deliver or justify in delivering the goods to an unpaid seller unless such bill is first surrendered for cancellation.

Sec. 40. That, except as provided in section thirty-nine, nothing in this act shall limit the rights and remedies of a mortgage or lien holder whose mortgage or lien on goods would be valid, apart from this act, as against one who for value and in good faith purchased from the owner, immediately prior to the time of their delivery to the carrier, the goods which are subject to the mortgage or lien and obtained possession of them.

Sec. 41. That any person who, knowingly or with intent to defraud, falsely makes, alters, forges, counterfeits, prints or photographs any bill of lading purporting to represent goods received for shipment among the several States or with foreign nations, or with like intent utters or publishes as true and genuine any such falsely altered, forged, counterfeited, falsely printed or photographed bill of lading, knowing it to be falsely altered, forged, counterfeited, falsely printed or photographed, or aids in making, altering, forging, counterfeiting, printing, photographing, or uttering or publishing the same, or issues or aids in issuing or procuring the issue of, or negotiates or transfers for value a bill which contains a false statement as to the receipt of the goods, or as to any other matter, or who, with intent to defraud, violates, or fails to comply with, or aids in any violation of, or failure to comply with any provisions of this act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding \$5,000, or both.

Sec. 42. First. That in this act, unless the context of subject matter otherwise requires—

"Action" includes counterclaim, set-off, and suit in equity.

"Bill" means bill of lading governed by this act.

"Consignee" means the person named in the bill as the person to whom delivery of the goods is to be made.



"Consignor" means the person named in the bill as the person from whom the goods have been received for shipment.

"Goods" means merchandise or chattels in course of transportation or which have been or are about to be transported.

"Holder" of a bill means a person who has both actual possession of such bill and a right of property therein.

"Order" means an order by indorsement on the bill.

"Person" includes a corporation or partnership, or two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee and to take as pledge.

"State" includes any Territory, District, insular possession, or isthmian possession.

Sec. 43. That the provisions of this act do not apply to bills made and delivered prior to the taking effect thereof.

Sec. 44. That the provisions and each part thereof and the sections and each part thereof of this act are independent and severable, and the declaring of any provision or part thereof, or provisions or part thereof, or section or part thereof, or sections or part thereof, unconstitutional shall not impair or render unconstitutional any other provision or part thereof or section or part thereof.

Sec. 45. That this act shall take effect and be in force on and after the first day of January next after its passage.

## APPENDIX D.

### ACT PROVIDING FOR FEDERAL CONTROL OF TRANSPORTATION SYSTEMS DURING WAR.

AN ACT to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes.

Sec. 1. That the President, having in time of war taken over the possession, use, control, and operation (called herein Federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission, that during the period of such Federal control it shall receive as just compensation an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth, nineteen hundred and seventeen.

That any railway operating income accruing during the period of Federal control in excess of such just compensation shall remain the property of the United States. In the computation of such income, debits and credits arising from the accounts called in the monthly reports to the Interstate Commerce Commission equipment rents and joint facility rents shall be included, but debits and credits arising from the operation of such street electric passenger railways, including railways commonly called interurbans, as are at the time of the agreement not under Federal control, shall be excluded. If any lines were acquired by, leased to, or consolidated with such railroad or system between July first, nineteen hundred and fourteen, and December thirty-first, nineteen hundred and seventeen, both inclusive, and separate operating returns to the Interstate Commerce Commission were not made for such lines after such acquisition, lease, or consolidation there shall (before the average is computed) be added to the total railway operating income of such railroad or system for the three years ended June thirtieth, nineteen hundred and seventeen, the total railway operating income of the lines so acquired, leased, or consolidated, for the period beginning July first, nineteen hundred and fourteen, and ending on the date of such acquisition, lease, or consolidation, or on December thirty-first, nineteen hundred and seventeen, whichever is the earlier. The average annual railway operating income shall be ascertained by the Interstate Commerce Commission and certified by it to the President. Its certificate shall, for the purpose of such agreement, be taken as conclusive of the amount of such average annual railway operating income.

Every such agreement shall provide that any Federal taxes under the Act of October third, nineteen hundred and seventeen, or Acts in addition thereto or in amendment thereof, commonly called war

taxes, assessed for the period of Federal control beginning January first, nineteen hundred and eighteen, or any part of such period, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation; that other taxes assessed under Federal or any other governmental authority for the period of Federal control or any part thereof, either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation (not including, however, assessments for public improvements or taxes assessed on property under construction, and chargeable under the classification of the Interstate Commerce Commission to investment in road and equipment), shall be paid out of revenues derived from railway operations while under Federal control; that all taxes assessed under Federal or any other governmental authority for the period prior to January first, nineteen hundred and eighteen, whenever levied or payable, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation.

Every such agreement shall also contain adequate and appropriate provisions for the maintenance, repair, renewals, and depreciation of the property, for the creation of any reserves or reserve funds found necessary in connection therewith, and for such accounting and adjustments or charges and payments, both during and at the end of Federal control as may be requisite in order that the property of each carrier may be returned to it in substantially as good repair and in substantially as complete equipment as it was in at the beginning of Federal control, and also that the United States may, by deductions from the just compensation or by other proper means and charges, be reimbursed for the cost of any additions, repairs, renewals, and betterments to such property not justly chargeable to the United States; in making such accounting and adjustments, due consideration shall be given to the amounts expended or reserved by each carrier for maintenance, repairs, renewals, and depreciation during the three years ended June thirtieth, nineteen hundred and seventeen, to the condition of the property at the beginning and at the end of Federal control and to any other pertinent facts and circumstances.

The President is further authorized in such agreement to make all other reasonable provisions, not inconsistent with the provisions of this Act or of the Act entitled, "An Act making appropriations for the support of the Army for the fiscal year ending June, thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, that he may deem necessary or proper for such Federal control or for the determination of the mutual rights and obligations of the parties to the agreement arising from or out of such Federal control.

If the President shall find that the condition of any carrier was during all or a substantial portion of the period of three years ended June thirtieth, nineteen hundred and seventeen, because of nonoperation, receivership, or where recent expenditures for additions or improvements or equipment were not fully reflected in the operating

railway income of said three years or a substantial portion thereof, or because of any undeveloped or abnormal conditions, so exceptional as to make the basis of earnings hereinabove provided for plainly inequitable as a fair measure of just compensation, then the President may make with the carrier such agreement for such amount as just compensation as under the circumstances of the particular case he shall find just.

That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within "Federal control," as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act: *Provided, however,* That nothing in this paragraph shall be construed as including any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic, or sale of power, heat and light, or both.

The agreement shall also provide that the carrier shall accept all the terms and conditions of this Act and any regulation or order made by or through the President under authority of this Act or of that portion of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, which authorizes the President in time of war to take possession, assume control, and utilize systems of transportation.

Sec. 2. That if no such agreement is made, or pending the execution of an agreement, the President may nevertheless pay to any carrier while under Federal control an annual amount, payable in reasonable installments, not exceeding ninety per centum of the estimated annual amount of just compensation, remitting such carrier, in case where no agreement is made, to its legal rights for any balance claimed to the remedies provided in section three hereof. Any amount thereafter found due such carrier above the amount paid shall bear interest at the rate of six per centum per annum. The acceptance of any benefits under this section shall constitute an acceptance by the carrier of all the provisions of this Act and shall obligate the carrier to pay to the United States, with interest at the rate of six per centum per annum from a date or dates fixed in proceedings under section three, the amount by which the sums received under this section exceed the sum found due in such proceedings.

Sec. 3. That all claims for just compensation not adjusted (as provided in section one) shall, on the application of the President or of any carrier, be submitted to boards, each consisting of three referees to be appointed by the Interstate Commerce Commission, members of which and the official force thereof being eligible for service on such boards without additional compensation. Such boards of referees

are hereby authorized to summon witnesses, require the production of records, books, correspondence, documents, memoranda, and other papers, view properties, administer oaths, and may hold hearings in Washington and elsewhere, as their duties and the convenience of the parties may require. In case of disobedience to a subpoena the board may invoke the aid of any district court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence, and such court within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, corporation, partnership, or association, issue an order requiring appearance before the board, or the production of documentary evidence if so ordered, or the giving of evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. Such cases may be heard separately or together or by classes, by such boards as the Interstate Commerce Commission in the first instance, or any board of referees to which any such cases shall be referred may determine. Said boards shall give full hearings to such carriers and to the United States; shall consider all the facts and circumstances, and shall report as soon as practicable in each case to the President the just compensation, calculated on an annual basis and otherwise in such form as to be convenient and available for the making of such agreement as is authorized in section one. The President is authorized to enter into an agreement with such carrier for just compensation upon a basis not in excess of that reported by such board, and may include therein provisions similar to those authorized under section one. Failing such agreement, either the United States or such carrier may file a petition in the Court of Claims for the purpose of determining the amount of such just compensation, and in the proceedings in said court the report of said referees shall be prima facie evidence of the amount of just compensation and of the facts therein stated. Proceedings in the Court of Claims under this section shall be given precedence and expedited in every practicable way.

Sec. 4. That the just compensation that may be determined as hereinbefore provided by agreement or that may be adjudicated by the Court of Claims, shall be increased by an amount reckoned at a reasonable rate per centum to be fixed by the President upon the cost of any additions and betterments, less retirements, and upon the cost of road extensions to the property of such carrier made by such carrier with the approval of or by order of the President while such property is under Federal control.

Sec. 5. That no carrier while under Federal control shall, without the prior approval of the President, declare or pay any dividend in excess of its regular rate of dividends during the three years ended June thirtieth, nineteen hundred and seventeen: *Provided, however,* That such carriers as have paid no regular dividends or no dividends during said period may, with the prior approval of the President, pay dividends at such rate as the President may determine.

Sec. 6. That the sum of \$500,000,000 is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, which together with any funds available from any operating income of said carriers, may be used by the President as a revolving fund for the purpose of paying the expenses of the Federal control, and so far as necessary the amount of just compensation, and to provide terminals, motive power, cars, and other necessary equipment, such terminals, motive power, cars, and equipment to be used and accounted for as the President may direct and to be disposed of as Congress may hereafter by law provide.

The President may also make or order any carrier to make any additions, betterments, or road extensions, and to provide terminals, motive power, cars, and other equipment necessary or desirable for war purposes or in the public interest on or in connection with the property of any carrier. He may from said revolving fund advance to such carrier all or any part of the expense of such additions, betterments, or road extensions, and to provide terminals, motive power, cars, and other necessary equipment so ordered and constructed by such carrier or by the President, such advances to be charged against such carrier and to bear interest at such rate and be payable on such terms as may be determined by the President, to the end that the United States may be fully reimbursed for any sums so advanced.

Any loss claimed by any carrier by reason of any such additions, betterments, or road extensions so ordered and constructed may be determined by agreement between the President and such carrier; failing such agreement the amount of such loss shall be ascertained as provided in section three hereof.

From said revolving fund the President may expend such an amount as he may deem necessary or desirable for the utilization and operation of canals, or for the purchase, construction, or utilization and operation of boats, barges, tugs, and other transportation facilities on the inland, canal and coastwise waterways and may in the operation and use of such facilities create or employ such agencies and enter into such contracts and agreements as he shall deem in the public interest.

Sec. 7. That for the purpose of providing funds requisite for maturing obligations or for other legal and proper expenditures or for reorganizing railroads in receivership, carriers may, during the period of Federal control, issue such bonds, notes, equipment trust certificates, stock, and other forms of securities, secured or unsecured by mortgage, as the President may first approve as consistent with the public interest. The President may, out of the revolving fund created by this Act, purchase for the United States all or any part of such securities at prices not exceeding par, and may sell such securities whenever in his judgment it is desirable at prices not less than the cost thereof. Any securities so purchased shall be held by the Secretary of the Treasury, who shall, under the direction of the President, represent the United States in all matters in connection therewith in the same manner as a private holder thereof. The

President shall each year as soon as practicable after January first, cause a detailed report to be submitted to the Congress of all receipts and expenditures made under this section and section six during the preceding calendar year.

SEC. 8. That the President may execute any of the powers herein and heretofore granted him with relation to Federal control through such agencies as he may determine, and may fix the reasonable compensation for the performance of services in connection therewith, and may avail himself of the advice, assistance, and cooperation of the Interstate Commerce Commission and of the members and employees thereof, and may also call upon any department, commission, or board of the government for such services as he may deem expedient. But no such official or employee of the United States shall receive any additional compensation for such services except as now permitted by law.

SEC. 9. That the provisions of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, shall remain in force and effect except as expressly modified and restricted by this Act; and the President, in addition to the powers conferred by this Act, shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred. The provisions of this Act shall also apply to any carriers to which Federal control may be hereafter extended.

SEC. 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any Act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control.

That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares,

charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination.

Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and coordinated national control and not in competition.

After full hearing the commission may make such findings and orders as are authorized by the Act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said Act: *Provided, however,* That when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President together with such recommendations as he may make.

Sec. 11. That every person or corporation, whether carrier or shipper, or any receiver, trustee, lessee, agent, or person acting for or employed by a carrier or shipper or other person, who shall knowingly violate or fail to observe any of the provisions of this Act, or shall knowingly interfere with or impede the possession, use, operation, or control of any railroad property, railroad, or transportation system hitherto or hereafter taken over by the President, or shall knowingly violate any of the provisions of any order or regulation made in pursuance of this Act, shall be guilty of a misdemeanor, and shall, upon conviction, be punished by a fine of not more than \$5,000, or, if a person, by imprisonment for not more than two years, or both. Each independent transaction constituting a violation of, or a failure to observe, any of the provisions of this Act, or any order entered in pursuance hereof, shall constitute a separate offense. For the taking or conversion to his own use or the embezzlement of money or property derived from or used in connection with the possession, use, or operation of said railroad or transportation systems, the criminal statutes of the United States, as well as the criminal statutes of the various States where applicable, shall apply



to all officers, agents, and employees engaged in said railroad and transportation service, while the same is under Federal control, to the same extent as to persons employed in the regular service of the United States. Prosecutions for violations of this Act or of any order entered hereunder shall be in the district courts of the United States, under the direction of the Attorney General, in accordance with the procedure for the collection and imposing of fines and penalties now existing in said courts.

Sec. 12. That moneys and other property derived from the operation of the carriers during Federal control are hereby declared to be the property of the United States. Unless otherwise directed by the President, such moneys shall not be covered into the Treasury, but such moneys and property shall remain in the custody of the same officers, and the accounting thereof shall be in the same manner and form as before Federal control. Disbursements therefrom shall, without further appropriation, be made in the same manner as before Federal control and for such purposes as under the Interstate Commerce Commission classification of accounts in force on December twenty-seventh, nineteen hundred and seventeen, are chargeable to operating expenses or to railway tax accruals and for such other purposes in connection with Federal control as the President may direct, except that taxes under Titles One and Two of the Act entitled "An Act to provide revenue to defray war expenses, and for other purposes," approved October third, nineteen hundred and seventeen, or any Act in addition thereto or in amendment thereof, shall be paid by the carrier out of its own funds. If Federal control begins or ends during the tax year for which any taxes so chargeable to railway tax accruals are assessed, the taxes for such year shall be apportioned to the date of the beginning or ending of such Federal control, and disbursements shall be made only for that portion of such taxes as is due for the part of such tax year which falls within the period of Federal control.

At such periods as the President may direct, the books shall be closed and the balance of revenues over disbursements shall be covered into the Treasury of the United States to the credit of the revolving fund created by this Act. If such revenues are insufficient to meet such disbursements, the deficit shall be paid out of such revolving fund in such manner as the President may direct.

Sec. 13. That all pending cases in the courts of the United States affecting railroads or other transportation systems brought under the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended and supplemented, including the commodities clause, so called, or under the Act to protect trade and commerce against unlawful restraints and monopolies, approved July second, eighteen hundred and ninety, and amendments thereto, shall proceed to final determination as soon as may be, as if the United States had not assumed control of transportation systems; but in any such case the court having jurisdiction may, upon the application of

the United States, stay execution of final judgment or decree until such time as it shall deem proper.

Sec. 14. That the Federal control of railroads and transportation systems herein and heretofore provided for shall continue for and during the period of the war and for a reasonable time thereafter, which shall not exceed one year and nine months next following the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: *Provided, however,* That the President may, prior to July first, nineteen hundred and eighteen, relinquish control of all or any part of any railroad or system of transportation, further Federal control of which the President shall deem not needful or desirable; and the President may at any time during the period of Federal control agree with the owners thereof to relinquish all or any part of any railroad or system of transportation. The President may relinquish all railroads and systems of transportation under Federal control at any time he shall deem such action needful or desirable. No right to compensation shall accrue to such owners from and after the date of relinquishment for the property so relinquished.

Sec. 15. That nothing in this Act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds.

Sec. 16. That this Act is expressly declared to be emergency legislation enacted to meet conditions growing out of war; and nothing herein is to be construed as expressing or prejudicing the future policy of the Federal Government concerning the ownership, control, or regulation of carriers or the method or basis of the capitalization thereof.

Approved, March 21, 1918.

## APPENDIX E.

### RULES OF PRACTICE BEFORE THE COMMISSION IN PROCEEDINGS UNDER THE ACT TO REGULATE COMMERCE.

#### I.

##### PUBLIC SESSIONS.

Sessions of the Commission for hearing evidence or oral arguments will be held as ordered by the Commission.

The office of the Commission at Washington, D. C., is open each business day from 9 a. m. to 4:30 p. m.

#### II.

##### PARTIES.

Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, or the railroad commissioner or commission of any State or Territory, may complain to the Commission of anything done, or omitted to be done, in violation of the provisions of the act to regulate commerce, as amended, by any common carrier subject to the provisions of said act. Any such party may appear and be heard in person or by attorney.

Two or more complainants may join in one complaint against two or more defendants, if the complaint involves substantially the same principal, subject, or state of facts.

If a complaint relates to matters in which two or more carriers, engaged in transportation by continuous carriage or shipment, are interested, the several carriers participating in such carriage or shipment are necessary parties defendant.

If a complaint relates to rates, regulations, or practices of carriers operating different lines, and the object of the proceeding is to secure correction of such rates, regulations, or practices on each of said lines, all the carriers operating such lines should be made defendants.

If a complaint relates to provisions of a classification it will ordinarily be sufficient to name as defendants the carriers forming one or more through routes between representative points of origin and destination.

If the line of a carrier is operated by a receiver or trustee, both the carrier and its receiver or trustee must be made defendants in cases involving transportation over such line.

Any person may file an intervening petition in any proceeding prior to or at the time the case is called for hearing, but not after except for good cause shown. Such petition shall set forth the grounds of the proposed intervention and the petitioner's interest in the proceedings. Intervention will not be permitted except upon allegations that are reasonably pertinent to the issues already presented. Leave granted on such petition will entitle interveners to have notice of

hearings, to produce and cross-examine witnesses, and to be heard in person or by attorney upon brief and at the oral argument. The petition need not be verified, but must be signed in ink by petitioner or his duly authorized attorney. The petitioner must furnish as many complete copies thereof as there are parties to the case, and three additional copies for the use of the Commission.

### III.

#### COMPLAINTS.

Complaints must be typewritten on one side of the paper only, or be printed. In either case the complaint must conform to the specifications of rule XXI. The names of all parties, complainant or defendant, must be stated in full, without abbreviations, and the address of each complainant, with the name and address of his attorney, if any, must appear upon each copy. The complaint need not be verified, but must be signed in ink by the complainant or his duly authorized attorney. The complainant must furnish as many complete copies of the complaint as there may be parties defendant to be served, including receivers or trustees, and three additional copies for the use of the Commission.

The Commission will serve the complaint upon each defendant by leaving a copy with its designated agent in the District of Columbia, or, if no such agent has been designated, by posting a copy in the office of the secretary of the Commission.

Complaints should be so drawn as fully and completely to advise the defendant and the Commission wherein the provisions of the act have been violated and should set forth briefly and in plain language the facts claimed to constitute such violation. Two or more grounds of complaint involving the same principal, subject, or state of facts, may be included in one complaint, but should be separately stated and numbered. The several rates, regulations, and discriminations complained of should be set out by specific reference to the tariffs in which they appear whenever that is practicable.

Where the rate attacked is one increased after January 1, 1910, the complaint should so state.

In case discrimination in violation of sections 3 or 4 of the act is alleged the complaint should specify and describe in detail the particular preference or advantage to any person, company, firm, corporation, locality, or traffic, which is relied upon as constituting such discrimination. Appropriate allegation should also be made in such case to present for decision the issue as to whether or not such rates, charges, or other matters complained of are just and reasonable. In case a violation of section 4 is alleged the complaint should specify and describe in detail the particular violation of that section, giving tariff references whenever practicable.

Except under unusual circumstances, and for good cause shown, reparation will not be awarded unless specifically prayed for in the complaint or in an amendment thereto filed before the submission of the case.

After a final order has been entered upon a complaint in which reparation is not sought or, if prayed, has been denied, the Commission will not ordinarily award reparation upon a complaint subsequently filed and based upon any finding upon the first complaint.

Where reparation is sought the complaint should state (a) that complainant makes claim for reparation, (b) the name of each individual claimant asking reparation, (c) the commodities transported, (d) the names of defendants against which claim is made, (e) the period of time within which or the specific date upon which the shipments were made, and (f) the points of origin and destination, either specifically, or, where they are numerous, by a definite indication of a defined territorial or rate group of the points of origin and destination. Under a general rate adjustment challenged in the complaint, or upon many shipments under a particular rate, or where many points of origin or destination are involved, it is the practice of the Commission first to find and determine in its report as to the reasonableness of the rate or rates in issue, and whether the parties seeking reparation paid and bore the charges and are entitled to reparation, thereafter giving to such parties an opportunity to make proof respecting the shipments upon which reparation is claimed. In such cases freight bills and other exhibits bearing on the amount of reparation should be reserved until called for and should not be filed with the complaint. The parties, however, should be prepared to produce at the hearing the freight bills and other exhibits bearing on the amount of reparation, for the reason that they may become necessary in developing other facts in the case.

When a claim for reparation has been before the Commission informally and the parties have been notified by the Commission that the claim is of such a nature that it can not be determined informally, or when the parties voluntarily withdraw the claim from informal consideration, or when a claim has been filed with the Commission merely to stop the running of the statute of limitations, formal complaint thereon must be filed within six months from the date of such notification, withdrawal or filing. Otherwise the parties will be deemed to have abandoned their claim and the complaint will not be entertained: *Provided, however*, That this rule does not apply to formal complaints for reparation filed within two years from the date of the delivery of the shipments.

#### IV.

##### ANSWERS.

Answers must be typewritten on one side of the paper only, or be printed. In either case the answer must conform to the specifications of rule XXI.

One copy of each answer must, unless the Commission orders otherwise, be filed with the secretary of the Commission at his office in Washington, D. C., within 30 days after the day of service of the complaint, by defendants whose general offices are at or west of El Paso, Tex., Salt Lake City, Utah, or Spokane, Wash., and within 20 days

by all other defendants, and a copy of each such answer must be at the same time served personally or by mail upon the complainant or his attorney. The Commission will, when advisable, shorten or extend the time for answer.

Answers should be so drawn as fully and completely to advise the complainant and the Commission of the nature of the defense, and should admit or deny specifically and in detail each material allegation of the complaint. Whenever it is apparent from the complaint, either by direct allegation or otherwise, that a departure from the requirements of the fourth section of the act is involved, the answer should set forth by number the particular application or order which protects such departure. An answer denying that a discrimination is undue or unjust should explain fully wherein such discrimination is not undue or unjust. It is desired that every effort be thus made to narrow the issues upon hearing.

If a defendant satisfies a complaint either before or after answering, a signed acknowledgment thereof must be filed by both parties, stating when and how the complaint has been satisfied.

#### V.

##### FORMAL CLAIMS FOR REPARATION BASED UPON FINDINGS OF THE COMMISSION.

When the Commission finds that reparation is due, but that the amount can not be ascertained upon the record before it, the complainant should immediately prepare a statement in accordance with Form 5, showing as to each shipment upon which reparation is claimed the date of delivery, car initials and number, points of origin and destination, route, commodity, weight, rate applied, charges collected, rate found reasonable and charges applicable thereunder, and the amount of reparation payable upon the basis of the findings.

Such statements should not include any shipments which were transported upon rates other than those included in the Commission's findings nor any shipments which were delivered at destination more than two years before the complaint was informally or formally presented to the Commission. The statement should then be forwarded to the carrier which collected the charges for certification as to its accuracy. Such certification should cover not only the movement of the shipments and the amount of charges but also the amount of reparation claimed under the Commission's findings. Discrepancies, duplications, or other errors in such statements should be adjusted by the parties and an agreed statement submitted to the Commission in accordance with Form 5.

#### VI.

##### SERVICE OF PAPERS.

Notices and copies of papers, other than complaints, depositions, and intervening petitions, must be served upon all parties personally or by mail. When any party has appeared by attorney, service upon such attorney will be deemed proper service upon the party.

VII.

AMENDMENTS.

Amendments to any complaint or answer in any proceeding will be allowed or refused by the Commission at its discretion.

VIII.

CONTINUANCES AND EXTENSIONS OF TIME.

Continuances and extensions of time will be granted or denied by the Commission at its discretion.

IX.

STIPULATIONS.

Partes to any proceeding may, by stipulation in writing filed with the secretary, or presented at the hearing, agree upon the facts, or any portion thereof, involved therein. It is desired that the facts be thus agreed upon as far as and whenever practicable.

X.

HEARINGS.

When issue is joined upon formal complaint by service of answer, or by failure of defendant to answer, the Commission will assign a time and place for hearing. Witnesses will be examined orally before the Commission or one of its examiners, unless their testimony be taken by deposition or the facts be agreed upon as provided for in these rules.

At hearings on formal complaint the complainant shall open and close. At hearings upon applications for relief from any provision of the act the applicant shall open and close. At hearings of investigation and suspension proceedings the respondent shall open and close. At hearings of all other investigations, on the motion of the Commission, the Commission shall open and close, except that upon proper notice in advance of the hearing the Commission may prescribe a different order. In hearings of several proceedings upon a consolidated record the presiding commissioner or examiner shall designate who shall open and close. Interveners shall follow the party in whose behalf the intervention is made, and in all cases where the intervention is not in support of either original party the presiding commissioner or examiner shall designate the order of procedure for such interveners.

XI.

DEPOSITIONS.

The deposition of a witness for use in a proceeding pending before the Commission may, after issue joined, be taken in compliance with the following rules of procedure, prescribed under section 17 of the act, but not otherwise.

Such depositions may be taken before a special agent or examiner of the Commission, or any judge or commissioner of any court of the United States, or any clerk of a district court, or any chancellor,

justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public not being of counsel or attorney to either of the parties nor interested in the event of the proceeding or investigation, according to such designation as the Commission may make in any order made by it in the premises, except that where such deposition is taken in a foreign country it may be taken before an officer or person designated by the Commission or agreed upon by the parties by stipulation in writing to be filed with the Commission.

Any party desiring to take the deposition of a witness in such a proceeding shall notify the Commission to that effect, and in such notice shall state the time when, the place where, and the name and post-office address of the party before whom it is desired that the deposition be taken, the name and post-office address of the witness, and the subject matter or matters concerning which the witness is expected to testify, whereupon the Commission will make and serve upon the parties or their attorneys an order wherein the Commission shall name the witness whose deposition is to be taken and specify the time when, the place where, and the party before whom the witness is to testify, but such time and place, and the party before whom the deposition is to be taken, so specified in the Commission's order, may or may not be the same as those named in said notice to the Commission.

Every person whose deposition is so taken shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth and nothing but the truth concerning the matter about which he shall testify, and shall be carefully examined. His testimony shall be reduced to typewriting by the officer before whom the deposition is taken or under his direction, after which the deposition shall be subscribed by the witness and certified in usual form by the officer. After the deposition has been so subscribed and certified it shall, together with two copies thereof made by such officer or under his direction, be forwarded by such officer under seal in an envelope addressed to the Commission at its office in Washington, D. C. Upon receipt of the deposition and copies the Commission will file in the record in said proceeding such deposition and forward one copy to the complainant or his attorney and the other copy to the defendant or its attorney, except that where there are more than one complainant or defendant the copies will be forwarded by the Commission to the parties designated by such complainants or defendants as the case may be.

Such depositions must be typewritten and must conform to the specifications of rule XXI.

No deposition shall be taken except after 6 days' notice to the parties, and where the deposition is taken in a foreign country such notice shall be at least 15 days.

No such deposition shall be taken either before the proceeding is at issue or, unless under special circumstance and for good cause shown, within 10 days prior to the date of the hearing thereof assigned by the



Commission, and where the deposition is taken in a foreign country it shall not be taken after 30 days prior to such date of hearing.

Witnesses whose depositions are taken pursuant to these rules and the magistrate or the officer taking the same, unless he be an examiner of the Commission, shall severally be entitled to the same fees as are paid for like service in the courts of the United States, which fees shall be paid by the party or parties at whose instance the depositions are taken.

## XII.

### WITNESSES AND SUBPŒNAS.

Subpœnas requiring the attendance of witnesses from any place in the United States to any designated place of hearing may be issued by any member of the Commission.

Subpœnas for the production of books, papers, or documents (unless directed by the Commission upon its own motion) will issue only upon application in writing. Applications to compel witnesses who are not parties to the proceedings, or agents of such parties, to produce documentary evidence must be verified and must specify, as nearly as may be, the books, papers, or documents desired and the facts to be proven by them. Applications to compel a party to the proceeding to produce books, papers, or documents need only set forth in a general way the books, papers, or documents sought, with a statement that the applicant believes they will be of service in the determination of the proceeding.

Witnesses whose testimony is taken orally are entitled to the same fees as are paid for like services in the courts of the United States, such fees to be paid by the party at whose instance the testimony is taken.

## XIII.

### DOCUMENTARY EVIDENCE.

Where relevant and material matter offered in evidence is embraced in a document containing other matter not material or relevant and not intended to be put in evidence, such document will not be received, but the party offering the same shall present to opposing counsel and to the Commission true copies of such material and relevant matter, in proper form, which may be received in evidence and become part of the record.

In case any portion of a tariff, report, circular, or other document on file with the Commission is offered in evidence, the party offering the same must give specific reference to the items or pages and lines thereof to be considered. The Commission will take notice of items in tariffs and annual or other periodical reports of carriers properly on file with it or in annual, statistical, and other official reports of the Commission. When it is desired to direct the Commission's attention to such tariffs or reports upon hearing or in briefs or argument it must be done with the precision specified in the second preceding sentence. In case any testimony in other proceedings than the one

on hearing is introduced in evidence, a copy of such testimony must be presented as an exhibit. When exhibits of a documentary character are to be offered in evidence, copies should be furnished opposing counsel for use at the hearing.

All exhibits showing rates or distances must, by proper I. C. C. number reference, indicate the tariff authority for the rates, and must also show by lines and junction points the route via which the distances are computed, as well as the authority for the distance scale used.

Whenever evidence can be condensed in tables, that method of presentation should be adopted.

Where agreed upon by the parties at or after the hearing, the presiding commissioner or examiner, if he deems advisable, may permit the filing of specified documentary evidence as a part of the record within a time to be fixed by him, but, which shall expire not less than 10 days before the date fixed for filing and serving the opening brief. Documentary evidence will not be received after the close of testimony except as above provided.

#### XIV.

##### BRIEFS.

Unless otherwise specifically ordered, briefs may be filed upon application made at hearings or upon order of the Commission. Briefs must be printed in conformity with the specifications of rule XXI, and contain an abstract of the evidence, assembled by subjects, with reference to the pages of the record whereon the evidence appears. There should be included requests for specific findings which the parties think the Commission should make.

Documentary exhibits should not be reproduced in briefs, but may, if it is desired, be reproduced in an appendix to the brief. Analyses of such exhibits should be included in the abstract of evidence under the subjects to which they pertain. In cases involving a discrimination in rates against one community or locality and in favor of another community or locality, or otherwise involving a relationship of rates, and in investigation and suspension cases, the party who is required to file the first brief shall insert therein, opposite the statement of the case, a small map or chart of the territory showing the rate structure involved. The abstract of evidence should follow the statement of the case and precede the argument. Every brief of more than 20 pages shall contain on its front flyleaves a subject index with page references, the subject index to be supplemented by a list of all cases referred to alphabetically arranged, together with references to pages where the cases are cited.

Briefs for the various parties shall be filed in the same order as governs in the taking of their testimony at hearings. At the close of the testimony in each case the presiding commissioner or examiner will fix the time for filing and service of the respective briefs as follows, unless good cause for variation therefrom is shown: For the opening brief, 30 days from close of testimony; for the brief of the

opposing party, 15 days after the date fixed for the opening brief; for reply brief, 10 days after the date fixed for the brief of the opposing party. Briefs of interveners shall be filed and served within the time fixed for the brief of the party in whose behalf the intervention is made, or within such other time as may be fixed by the presiding commissioner or examiner. Briefs not filed with the Commission and served so as to reach opposing counsel on or before the dates fixed therefor will not be received except by special permission of the Commission. Parties who fail to file opening brief, as required by this rule, will not be permitted to file reply to brief of opposing party. All briefs must be filed with the secretary and be accompanied by notice, showing service upon all opposing counsel who appeared at the hearing or on brief, and 15 copies of each brief shall be furnished for the use of the Commission, unless otherwise ordered. Applications for extension of time in which to file briefs shall be by petition, in writing, stating the facts on which the application rests, which must be filed with the Commission at least five days before the time for filing such brief.

#### ORAL ARGUMENT.

Oral argument will be had only as ordered by the Commission. Applications therefor shall be made at the hearing or in writing within 10 days after the close of testimony.

#### XV.

#### REHEARINGS.

Applications for reopening a proceeding after final submission, or for rehearing or reargument after decision, must be by petition stating specifically the grounds relied upon, and copies thereof must be served by the party filing the same upon all opposing counsel who appeared at the hearing or on brief. Application for rehearing that part of any case relating to reparation or other damage for past injuries must be filed with the Commission within 60 days after service of the order therein.

If such application be to reopen the proceeding for further evidence, the nature and purpose of such evidence must be briefly stated, and the same must not be merely cumulative. If the application be for a rehearing, the petition must specify the matters claimed to be erroneously decided, with a brief statement of the alleged errors. If any order of the Commission is sought to be reversed, changed, or modified on account of facts and circumstances arising subsequent to the hearing, or of consequences resulting from compliance therewith, the matters relied upon by the applicant must be fully set forth. At least 10 copies of all such applications must be filed with the Commission and be accompanied by notice showing service upon all opposing counsel. Such adverse parties may file a reply to such petition for rehearing or reopening within 10 days from the date of service upon them. Such reply must be served upon the attorney for petitioner and 10 copies must be filed with the Commission.

## XVI.

## TRANSCRIPTS OF TESTIMONY.

One copy of the testimony will be furnished by the Commission for the use of the complainant and one copy for the use of the defendant, without charge. If two or more complainants or defendants have appeared at the hearing, such complainants or defendants must designate to whom the copy for their use shall be delivered.

In proceedings instituted by the Commission on its own motion, including proceedings involving the suspension of tariffs, no copies of testimony will be furnished without charge.

## XVII.

## COMPLIANCE WITH ORDERS.

When an order has been issued, the defendant or defendants named therein must promptly notify the secretary of the Commission on or before the date upon which such order becomes effective whether or not compliance has been made therewith. If a change in rates is required, the notification to the secretary must be given in addition to the filing of proper tariffs.

## XVIII.

## APPLICATIONS UNDER FOURTH SECTION.

Any common carrier subject to the act to regulate commerce, as amended, may apply to the Commission, under the proviso clause of the fourth section, for such authorization as it is empowered to grant thereunder. Such application must be verified and conform to rule XXI. The application should specify the places and traffic involved, the rates, fares, or charges on such traffic for the shorter and longer distances, the carriers other than the applicant which may be interested in the traffic, the special nature of the case, the character of the hardship claimed to exist, and the extent of the relief sought by the applicant. Upon the filing of such application the Commission will take such action as the circumstances of the case require.

## XIX.

## SUSPENSIONS.

Suspensions of tariff schedules under section 15 of the act will not ordinarily be considered unless application therefor is made in writing at least 10 days before the time fixed in the tariff for such rates to take effect. Applications for suspensions must indicate the schedule affected by its I. C. C. number and give specific reference to the items against which protest is made, together with a statement of the grounds thereof. When application for the suspension of tariff schedules is made, seven copies of such application should be furnished.

## XX.

## INFORMATION TO PARTIES.

The secretary of the Commission will, upon request, advise any party as to the form of complaint, answer, or other paper necessary to be filed in any proceeding.

XXI.

SPECIFICATIONS OF COMPLAINTS, ANSWERS, BRIEFS, PETITIONS,  
APPLICATIONS, ETC.

All complaints, answers, petitions, applications, depositions, or other papers to be filed, if typewritten, must be on paper not more than 8½ inches wide and not more than 12 inches long, and weighing not less than 16 pounds to the ream, folio base 17 by 22 inches, with left-hand margin not less than 1½ inches wide. The impression must be on only one side of the paper.

Whenever such papers are printed they, as well as briefs, must be in 10 or 12 point type, on good unglazed paper, 5⅞ inches wide by 9 inches long, with inside margin not less than 1 inch wide, and with double-leaded text and single leaded citations.

XXII.

ADDRESS OF THE COMMISSION.

All communications to the Commission must be addressed to Washington, D. C., unless otherwise specifically directed.

APPROVED FORMS.

*These forms may be used in cases to which they are applicable, with such alterations as the circumstances may render necessary.*

NO. 1.

COMPLAINT.

BEFORE THE INTERSTATE COMMERCE COMMISSION.

<p>_____</p> <p>_____ v. _____</p> <p>THE _____ RAILROAD COMPANY,</p> <p>_____ RAILWAY COMPANY.</p>	}	<p><i>[Insert corporate title, without abbreviation, of carrier, or carriers, necessary defendants.]</i></p>
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The complaint of the above-named complainant, respectfully shows:

I. That *[complainant should here state nature and place of business, also whether a corporation, firm, or partnership, and if a firm or partnership, the individual names of the parties composing the same.]*

II. That the defendant above named is a [are] common carrier engaged in the transportation of passengers and property, wholly by railroad [or, partly by railroad and partly by water], between points in the state of \_\_\_\_\_ and points in the state of \_\_\_\_\_. and as such common carrier is [are] subject to the provisions of the act to regulate commerce approved February 4, 1887, and acts amendatory thereof or supplementary thereto.

III. That *[state in this and subsequent paragraphs, to be numbered IV, V, etc., the matter or matters intended to be complained of, naming every rate, rule, regulation, or practice the lawfulness of which is challenged, and also each point of origin and point of destination between which the rates complained of are applied. Whenever practicable tariff references should be given.]*

*[Where discrimination is charged, the facts constituting the basis of the charge should be clearly stated; that is, if the discrimination be under section 2, the person or persons claimed to be favored and the person or persons claimed to be injured should be named, and the kind of service and kind of traffic, together with the claimed similarity of circumstances and conditions of transportation, should be set forth. If the discrimination be under section 3, the particular person, company, firm, corporation, locality, or traffic claimed to be accorded undue or unreasonable preference or advantage, or subjected to undue or unreasonable prejudice or disadvantage should be stated, If the discrimination be under section 4, the particular provision of the section claimed to be violated—that is, whether the long-and-short-haul provision or the aggregate of intermediate rates provision—as well as the facts constituting such violation should be stated.]*

X. That by reason of the facts stated in the foregoing paragraphs complainant has [have] been subjected to the payment of rates [fares or charges] for transportation which were when exacted, and still are, (1) unjust and unreasonable in violation of section 1 of the act to regulate commerce, and [or] (2) unjustly discriminatory in violation of section 2, and [or] (3) unduly preferential or prejudicial in violation of section 3, and [or] (4) in violation of the long-and-short-haul [or, aggregate of intermediate rates] provision of section 4 thereof. *[Use one or more of the allegations numbered 1, 2, 3, 4, according to the facts as intended to be charged.]*

Wherefore complainant pray that defendant may be [severally] required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendant [and each of them] to cease and desist from the aforesaid violations of said act to regulate commerce, and establish and put in force and apply in future to the transportation of ——— between the origin and destination points named in paragraph ——— hereof, in lieu of the rates [rules, regulations, or practices] named in said paragraph, such other maximum rates [rules, regulations, or practices], as the Commission may deem reasonable and just [and also pay to complainant by way of reparation for the unlawful charges hereinbefore alleged the sum of ———, or such other sum as, in view of the evidence to be adduced herein, the Commission shall determine that complainant is [are] entitled to as an award of damages under the provisions of said act for violation thereof], and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at ———, 19—.

\_\_\_\_\_  
[Complainant's signature.]

NO. 2.

ANSWER.

BEFORE THE INTERSTATE COMMERCE COMMISSION.

THE \_\_\_\_\_ v. \_\_\_\_\_ } Docket No. \_\_\_\_\_.  
RAILROAD COMPANY.

The above named defendant, for answer to the complaint in this proceeding, respectfully state :

I. [*Here follow appropriate and responsive admissions, denials, and averments, answering the complaint paragraph by paragraph.*]

Wherefore defendant pray that the complaint in this proceeding be dismissed.

THE \_\_\_\_\_ RAILROAD COMPANY,  
By \_\_\_\_\_.

[*Title of officer.*]

NO. 3.

INTERVENING PETITION.

BEFORE THE INTERSTATE COMMERCE COMMISSION.

\_\_\_\_\_ v. \_\_\_\_\_ } Docket No. \_\_\_\_\_.  
\_\_\_\_\_

Comes now your petitioner, \_\_\_\_\_, and respectfully represents that he has an interest in the matters in litigation in the above-entitled proceeding and moves that he may be allowed to intervene in and become a party to said proceeding, and for cause of intervention says:

I. That [*intervener should here state nature and place of business, and whether a corporation, firm, or partnership, etc.*]

II. [*Intervener should here set out specifically its interest in the above-entitled proceeding in accordance with the last paragraph of rule II of the rules of practice.*]

Wherefore said \_\_\_\_\_ prays leave to intervene and be treated as a party hereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument, if oral argument is granted.

Dated at \_\_\_\_\_, 19—.

\_\_\_\_\_  
[*Intervener's signature.*]

NO. 4.

PETITION FOR REHEARING.

BEFORE THE INTERSTATE COMMERCE COMMISSION.

\_\_\_\_\_ v. \_\_\_\_\_ } Docket No. \_\_\_\_\_.  
\_\_\_\_\_

Comes now the complainant [*or defendant*] in the above-entitled proceeding and respectfully petitions the Commission to grant a re-

hearing therein, and in support of said petition respectfully shows:

I. [*Here set out specifically the matters claimed to be erroneously decided, with a brief statement of the alleged errors, in conformity with rule XV of the rules of practice.*]

Wherefore petitioner prays that a rehearing be granted in the above-entitled case and that the Commission enter such further order or orders in the premises as to it may seem reasonable and just.

Dated at \_\_\_\_\_, 19—.

\_\_\_\_\_  
[Petitioner's signature.]



FORM OF REPARATION STATEMENT UNDER RULE V.

No. 5.

Claim of Richard Roe under decision in Docket No.—

Date of delivery.	Car initials and number.	Origin.	Desti- nation.	Route.	Commod- ity	Weight.	As charged		Should be.		Repa- ration claimed.
							Rate.	Amount.	Rate.	Amount.	
Dec. 10, 1912	N.Y. & N. H., 79173	Chicago, Ill.	Provo, Utah ..	C. G. W., U. P., O. S. L., S. P. L. A.	Scoured wool, c. 1	21,009	\$3.67½	\$772.08	\$2.25	\$472.70	\$299.38
Mar. 29, 1913	S. R. L., 6769	do ..	do ..	do ..	do ..	11,256	3.67½	413.65	2.25	276.41	137.24
Oct. 7, 1913	C. E. I., 60288	do ..	do ..	do ..	do ..	12,700	3.67½	466.73	2.25	321.97	144.76
Oct. 7, 1913	O. W. R. & N., 10248	do ..	do ..	C. N. W., U. P., O. S. L., S. P. L. A.	do ..	15,300	3.67½	562.28	2.25	344.25	218.03
Jan. 27, 1914	C., M. & P. S., 206853	do ..	do ..	do ..	do ..	24,100	3.67½	885.67	2.25	525.03	360.64
								3,100.41		1,940.36	1,160.05

JOHN DOE,  
Attorney for Richard Roe.

I hereby certify that this statement has been checked against the records of this company and found correct.

November 10, 1915.

JOHN SMITH,  
Auditor, X. Y. Z. Ry. Co.

## APPENDIX F.

### THE FEDERAL EMPLOYERS' LIABILITY ACT OF 1908 AS AMENDED.

AN ACT Relating to the liability of common carriers by railroad to their employes in certain cases.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* Section 1. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

Sec. 2. Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions, of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

Sec. 3. In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe: *Provided*, That no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

Sec. 4. In any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

Sec. 5. Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employe or the person entitled thereto on account of the injury or death for which said action was brought.

Sec. 6. No action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

Sec. 7. The term "common carrier" as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

Sec. 8. Nothing in this act shall be held to limit the duty or liability of common carriers or to impair the rights of their employes under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress entitled "An Act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employes," approved June 11, 1906.

Approved, April 22, 1908. 35 U. S. Stat. at L. 65 c. 149.

AN ACT To amend an Act entitled "AN ACT relating to the liability of common carriers by railroad to their employes in certain cases," approved April twenty-second, nineteen hundred and eight.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That an Act entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases," approved April twenty-second, nineteen hundred and eight, be amended in section six so that said section shall read:

Sec. 6. No action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The juris-

diction of the courts of the United States under this act shall be concurrent with that of the courts of the several States, and no case arising under this act and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

Sec. 2. That said Act be further amended by adding the following section as section nine of said Act:

Sec. 9. Any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, but in such cases there shall be only one recovery for the same injury.

Approved, April 5, 1910.

## APPENDIX G.

### FEDERAL SAFETY APPLIANCE ACT AS AMENDED.

AN ACT to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

Section 1. From and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakeman to use the common hand brake for that purpose.

Sec. 2. On and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

Sec. 3. When any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section one of this act, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this act.

Sec. 4. From and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

Sec. 5. Within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of draw bars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the draw bars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the draw bars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common car-

riers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

Sec. 6. (As amended by the act of April 1, 1896.) Any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge: *Provided*, That nothing in this act contained shall apply to trains composed of four-wheeled cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.

Sec. 7. The Interstate Commerce Commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this act.

Sec. 8. Any employe of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive car, or train had been brought to his knowledge.

**Amendment of 1903 to Federal Safety Appliance Act of 1893.**

AN ACT to amend an act entitled, "An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six.

Section 1. The provisions and requirements of the act entitled "An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to

equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six [see pp. 2401, 2402], shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons, and the height of draw-bars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those train, cars, and locomotives exempted by the provisions of section six of said act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six, or which are used upon street railways.

Sec. 2. Whenever, as provided in said act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirements of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

Sec. 3. The provisions of this act shall not take effect until September first, nineteen hundred and three. Nothing in this act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States district attorney from any of the provisions, powers, duties, liabilities, or requirements of said act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements and liabilities of said act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six, shall, except as specifically amended by this act apply to this act.

Approved March 2nd, 1903. 32 Stat. at L. 943, c. 976.

**Amendment of 1910 to Federal Safety Appliance Act of 1893**

AN ACT to supplement "An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes and for other purposes," and other safety appliance acts, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this act shall apply to every common carrier and every vehicle subject to the act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, commonly known as the "Safety Appliance Acts."*

Sec. 2. That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this act to haul, or permit to be hauled or used on its line any car subject to the provisions of this act not equipped with appliances provided for in this act, to-wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: *Provided*, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose.

Sec. 3. That within six months from the passage of this act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this act and section four of the act of March second, eighteen hundred and ninety-three, and shall give notice of such designation to all common carriers subject to the provisions of this act by such means as the commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this act: *Provided*, That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this act. Said commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the commission.



Sec. 4. That any common carrier subject to this act using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of this act not equipped as provided in this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six: *Provided*, That where any car shall have been properly equipped as provided in this act and the other acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section four of this act or section six of the act of March second eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs and such repairs can not be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employe caused to such employe by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this act and the other acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective car contain live stock or "perishable" freight.

Sec. 5. That except that, within the limits specified in the preceding section of this act, the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in this act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from any of the provisions, powers, duties, liabilities, or requirements of said act of March second, eighteen hundred and ninety-three, as amended by the acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three; and, except as aforesaid, all of the provisions, powers, duties, requirements and liabilities of said act of March second, eighteen hundred and ninety-three, as amended by the acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, shall apply to this act.

Sec. 6. That it shall be the duty of the Interstate Commerce Commission to enforce the provisions of this act, and all powers heretofore granted to said commission are hereby extended to it for the purpose of the enforcement of this act.

Approved, April 14, 1910.

## APPENDIX H.

### ORDERS OF THE INTERSTATE COMMERCE COMMISSION UNDER SAFETY APPLIANCE ACT.

Order of the Interstate Commerce Commission, March 13, 1911  
IN RE DESIGNATING THE NUMBER, DIMENSIONS, LOCATION, AND MANNER  
OF APPLICATION OF CERTAIN SAFETY APPLIANCES.

Whereas by the third section of an act of Congress approved April 14, 1910, entitled "An act to supplement 'An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel-brakes, and for other purposes,' and other safety appliance acts, and for other purposes," it is provided, among other things, "That within six months from the passage of this act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided by section two of this act and section four of the act of March second, eighteen hundred and ninety-three, and shall give notice of such designation to all common carriers subject to the provisions of this act by such means as the Commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this act: *Provided*, That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this act;" and

Whereas hearings in the matter of the number, dimensions, location, and manner of application of the appliances, as provided in said section of said act, were held before the Interstate Commerce Commission at its office in Washington, D. C., on September 29th and 30th and October 7th, 1910, respectively; and February 27th, 1911;

Now, therefore, in pursuance of and in accordance with the provisions of said section three of said act, and superseding the Commission's order of October 13, 1910, relative thereto

*It is ordered*, That the number, dimensions, location, and manner of application of the appliances provided for by section two of the act of April 14, 1910, and section four of the act of March 2, 1893, shall be as follows:

## Box and Other House Cars.

## HAND-BRAKES.

Number: Each box or other house car shall be equipped with an efficient hand-brake which shall operate in harmony with the power-brake thereon.

The hand-brake may be of any efficient design, but must provide the same degree of safety as the design shown on Plate A.

Dimensions: The brake-shaft shall be not less than one and one-fourth ( $1\frac{1}{4}$ ) inches in diameter, of wrought iron or steel without weld.

The brake-wheel may be flat or dished, not less than fifteen (15), preferably sixteen (16), inches in diameter, of malleable iron, wrought iron or steel.

Location: The hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car, to the left of and not less than seventeen (17) nor more than twenty-two (22) inches from center.

Manner of Application: There shall be not less than four (4) inches clearance around rim of brake-wheel.

Outside edge of brake-wheel shall be not less than four (4) inches from a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill.

Top brake-shaft support shall be fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts or rivets. (See Plate A.)

A brake-shaft step shall support the lower end of brake-shaft. A brake-shaft step which will permit the brake-chain to drop under the brake-shaft shall not be used. U-shaped form of brake-shaft step is preferred. (See Plate A.)

Brake-shaft shall be arranged with a square fit at its upper end to secure the hand-brake wheel; said square fit shall be not less than seven-eighths ( $\frac{7}{8}$ ) of an inch square. Square-fit taper; nominally two (2) in twelve (12) inches. (See Plate A.)

Brake-chain shall be of not less than three-eighths ( $\frac{3}{8}$ ), preferably seven-sixteenths ( $\frac{7}{16}$ ), inch wrought iron or steel, with a link on the brake-rod end of not less than seven-sixteenths ( $\frac{7}{16}$ ), preferably one-half ( $\frac{1}{2}$ ), inch wrought iron or steel, and shall be secured to brake-shaft drum by not less than one-half ( $\frac{1}{2}$ ) inch hexagon or square-headed bolt. Nut on said bolt shall be secured by riveting end of bolt over nut. (See Plate A.)

Lower end of brake-shaft shall be provided with a trunnion of not less than three-fourths ( $\frac{3}{4}$ ), preferably one (1), inch in diameter extending through brake-shaft step and held in operating position by a suitable cotter or ring. (See Plate A.)

Brake-shaft drum shall be not less than one and one-half ( $1\frac{1}{2}$ ) inches in diameter. (See Plate A.)

Brake ratchet-wheel shall be secured to brake-shaft by a key or square fit; said square fit shall be not less than one and five-sixteenths

(1 5-16) inches square. When ratchet-wheel with square fit is used provision shall be made to prevent ratchet-wheel from rising on shaft to disengage brake-pawl. (See Plate A.)

Brake ratchet-wheel shall be not less than five and one-fourth ( $5\frac{1}{4}$ ), preferably five and one-half ( $5\frac{1}{2}$ ), inches in diameter and shall have not less than fourteen (14), preferably sixteen (16), teeth. (See Plate A.)

If brake ratchet-wheel is more than thirty-six (36) inches from brake-wheel, a brake-shaft support shall be provided to support this extended upper portion of brake-shaft; said brake-shaft support shall be fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts or rivets.

The brake-pawl shall be pivoted upon a bolt or rivet not less than five-eighths ( $\frac{5}{8}$ ) of an inch in diameter, or upon a trunnion secured by not less than one-half ( $\frac{1}{2}$ ) inch bolt or rivet, and there shall be a rigid metal connection between brake-shaft and pivot of pawl.

Brake-wheel shall be held in position on brake-shaft by a nut on a threaded extended end of brake-shaft; said threaded portion shall be not less than three-fourths ( $\frac{3}{4}$ ) of an inch in diameter; said nut shall be secured by riveting over or by the use of lock-nut or suitable cotter.

Brake-wheel shall be arranged with a square-fit for brake-shaft in hub of said wheel; taper of said fit, nominally two (2) in twelve (12) inches. (See Plate A.)

#### BRAKE-STEP.

If brake-step is used, it shall be not less than twenty-eight (28) inches in length. Outside edge shall be not less than eight (8) inches from face of car and not less than four (4) inches from a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill.

Manner of Application: Brake-step shall be supported by not less than two metal braces having a minimum cross-section area three-eighths ( $\frac{3}{8}$ ) by one and one-half ( $1\frac{1}{2}$ ) inches or equivalent, which shall be securely fastened to body of car not less than one-half ( $\frac{1}{2}$ ) inch bolts or rivets.

#### RUNNING-BOARDS.

Number: One (1) longitudinal running-board.

On outside-metal-roof cars two (2) latitudinal extensions.

Dimensions: Longitudinal running-board shall be not less than eighteen (18), preferably twenty (20), inches in width.

Latitudinal extensions shall be not less than twenty-four (24) inches in width.

Location: Full length of car, center of roof.

On outside-metal-roof cars there shall be two (2) latitudinal extensions from longitudinal running-board to ladder locations, except on refrigerator cars where such latitudinal extensions can not be applied on account of ice hatches.

Manner of Application: Running-boards shall be continuous from end to end and not cut or hinged at any point: *Provided*, That the

length and width of running-boards may be made up of a number of pieces fastened to saddle-blocks with screws or bolts.

The ends of longitudinal running-board shall be not less than six (6) nor more than ten (10) inches from a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill; and if more than four (4) inches from edge of roof of car, shall be securely supported their full width by substantial metal braces.

Running-boards shall be made of wood and securely fastened to car.

#### SILL-STEPS.

Number: Four (4).

Dimensions: Minimum cross-sectional area one-half ( $\frac{1}{2}$ ) by one and one-half ( $1\frac{1}{2}$ ) inches, or equivalent, of wrought iron or steel.

Minimum length of tread, ten (10), preferably twelve (12), inches.

Minimum clear depth, eight (8) inches.

Location: One (1) near each end on each side of car, so that there shall be not more than eighteen (18) inches from end of car to center of tread of sill-step.

Outside edge of tread of step shall be not more than four (4) inches inside of face of side of car, preferably flush with side of car.

Tread shall be not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

Manner of Application: Sill-steps exceeding twenty-one (21) inches in depth shall have an additional tread.

Sill-steps shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

#### LADDERS.

Number: Four (4).

Dimensions: Minimum clear length of tread: Side ladders sixteen (16) inches; end ladders fourteen (14) inches.

Maximum spacing between ladder-treads, nineteen (19) inches.

Top ladder-tread shall be located not less than twelve (12) nor more than eighteen (18) inches from roof at eaves.

Spacing of side ladder treads shall be uniform within a limit of two (2) inches from top ladder tread to bottom tread of ladder.

Maximum distance from bottom tread of side ladder to top tread of sill-step, twenty-one (21) inches.

End ladder treads shall be spaced to coincide with treads of side ladders, a variation of two (2) inches being allowed. Where construction of car will not permit the application of a tread of end ladder to coincide with bottom tread of side ladder, the bottom tread of end ladder must coincide with second tread from bottom of side ladder.

Hard-wood treads, minimum dimensions one and one-half ( $1\frac{1}{2}$ ) by two (2) inches.

Iron or steel treads, minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch.

Minimum clearance of treads, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

Location: One (1) on each side, not more than eight (8) inches from right end of car; one (1) on each end, not more than eight (8) inches from left side of car; measured from inside edge of ladder-stile or clearance of ladder treads to corner of car.

Manner of Application: Metal ladders without stiles near corners of cars shall have foot guards or upward projections not less than two (2) inches in height near inside end of bottom treads.

Stiles of ladders, projection two (2) or more inches from face of car, will serve as foot-guards.

Ladders shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets. Three-eighths ( $\frac{3}{8}$ ) inch bolts may be used for wooden treads which are gained into stiles.

#### END-LADDER CLEARANCE.

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-wheel, brake-step, running-board or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

#### ROOF-HANDHOLDS.

Number: One (1) over each ladder.

One (1) right-angle handhold may take the place of two (2) adjacent specified roof-handholds, provided the dimensions and locations coincide, and that an extra leg is securely fastened to car at point of angle.

Dimensions: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

Location: On roof of car: One (1) parallel to treads of each ladder, not less than eight (8) nor more than fifteen (15) inches from edge of roof, *except* on refrigerator cars where ice hatches prevent, when location may be nearer edge of roof.

Manner of Application: Roof-handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

#### SIDE-HANDHOLDS.

Number: Four (4).

[*Tread of side-ladder is a side-handhold.*]

Dimensions: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches, preferably twenty-four (24) inches.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

Location: Horizontal: One (1) near each end on each side of car.

Side-handholds shall be not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, *except* as provided above, where tread of ladder is a handhold. Clearance of outer end of handhold shall be not more than eight (8) inches from end of car.

Manner of Application: Side-handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

#### HORIZONTAL END-HANDHOLDS

Number: Eight (8) or more. (Four (4) on each end of car.)

[*Tread of end-ladder is an end-handhold.*]

Dimensions: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches, preferably twenty-four (24) inches.

A handhold fourteen (14) inches in length may be used where it is impossible to use one sixteen (16) inches in length.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

Location: One (1) near each side on each end of car, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, *except* as provided above, when tread of end-ladder is an end-handhold. Clearance of outer end of handhold shall be not more than eight (8) inches from side of car.

One (1) near each side of each end of car on face of end-sill or sheathing over end-sill, projecting outward or downward. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

On each end of cars with platform end-sill six (6) or more inches in width, measured from end-post or siding and extending entirely across end of car, there shall be one additional end-handhold not less than twenty-four (24) inches in length, located near center of car, not less than thirty (30) nor more than sixty (60) inches above platform end-sill.

Manner of Application: Horizontal end-handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

#### VERTICAL END-HANDHOLDS.

Number: Two (2) on full-width platform end-sill cars, as heretofore described.

Dimensions: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, eighteen (18), preferably twenty-four (24), inches.

Minimum clearance two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

Location: One (1) on each end of car opposite ladder, not more than eight (8) inches from side of car; clearance of bottom end of handhold shall be not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler.

Manner of Application: Vertical end-handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

#### UNCOUPLING-LEVERS.

Number: Two (2).

Uncoupling-levers may be either single or double, and of any efficient design.

Dimensions: Handles of uncoupling-levers, *except* those shown on Plate B or of similar designs, shall be not more than six (6) inches from side of car.

Uncoupling-levers of design shown on Plate B and of similar designs shall conform to the following-prescribed limits:

Handles shall be not more than twelve (12), preferably nine (9), inches from sides of cars. Center lift-arms shall be not less than seven (7) inches long.

Center of eye at end of center lift-arm shall be not more than three and one-half ( $3\frac{1}{2}$ ) inches beyond center of eye of uncoupling-pin or coupler when horn of coupler is against the buffer-block or end-sill. (See Plate B.)

Ends of handles shall extend not less than four (4) inches below bottom of end-sill or shall be so constructed as to give a minimum clearance of two (2) inches around handle. Minimum drop of handles shall be twelve (12) inches; Maximum, fifteen (15) inches over all. (See Plate B.)

Handles of uncoupling-levers of the "rocking" or "push-down" type shall be not less than eighteen (18) inches from top of rail when lock-block has released knuckle, and a suitable stop shall be provided to prevent inside arm from flying up in case of breakage.

Location: One (1) on each end of car.

When single lever is used it shall be placed on left side of end of car.

#### HOPPER CARS AND HIGH-SIDE GONDOLAS WITH FIXED ENDS.

[Cars with sides more than thirty-six (36) inches above the floor are high-side cars.]

#### HAND-BRAKES.

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."



Location: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of, and not more than twenty-two (22) inches from, center.

Manner of Application: Same as specified for "Box and other house cars."

#### BRAKE-STEP

Same as specified for "Box and other house cars."

#### SILL-STEPS.

Same as specified for "Box and other house cars."

#### LADDERS.

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars," *except* that top ladder-tread shall be located not more than four (4) inches from top of car.

Location: Same as specified for "Box and other house cars."

Manner of Application: Same as specified for "Box and other house cars."

#### SIDE-HANDHOLDS.

Same as specified for "Box and other house cars."

#### HORIZONTAL END-HANDHOLDS.

Same as specified for "Box and other house cars."

#### VERTICAL END-HANDHOLDS.

Same as specified for "Box and other house cars."

#### UNCOUPLING-LEVERS.

Same as specified for "Box and other house cars."

#### END-LADDER CLEARANCE.

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-wheel, brake-step or uncoupling lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

### DROP-END HIGH-SIDE GONDOLA CARS

#### HAND-BRAKES.

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

Manner of Application: Same as specified for "Box and other house cars."

## SILL-STEPS.

Same as specified for "Box and other house cars."

## LADDERS.

Number: Two (2).

Dimensions: Same as specified for "Box and other house cars," *except* that top ladder-tread shall be located not more than four (4) inches from top of car.

Location: One (1) on each side, not more than eight (8) inches from right end of car, measured from inside edge of ladder-stile or clearance of ladder-treads to corner of car.

Manner of Application: Same as specified for "Box and other house cars."

## SIDE-HANDHOLDS.

Same as specified for "Box and other house cars."

## HORIZONTAL END-HANDHOLDS.

Number: Four (4).

Dimensions: Same as specified for "Box and other house cars."

Location: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application: Same as specified for "Box and other house cars."

## UNCOUPLING-LEVERS.

Same as specified for "Box and other house cars."

## END-LADDER CLEARANCE.

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-wheel, or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

## FIXED-END LOW-SIDE GONDOLA AND LOW-SIDE HOPPER CARS.

*[Cars with sides thirty-six (36) inches or less above the floor are low-side cars.]*

## HAND-BRAKES.

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car, to the left of and not more than twenty-two (22) inches from center.

Manner of Application: Same as specified for "Box and other house cars."

## BRAKE-STEP.

Same as specified for "Box and other house cars."

## SILL-STEPS.

Same as specified for "Box and other house cars."

## SIDE-HANDHOLDS.

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location. Horizontal: One (1) near each end on each side of car, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, if car construction will permit, but handhold shall not project above top of side. Clearance of outer end of handhold shall be not more than eight (8) inches from end of car.

Manner of Application: Same as specified for "Box and other house cars."

## HORIZONTAL END-HANDHOLDS.

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: One (1) near each side on each end of car not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, if car construction will permit. Clearance of outer end of handhold shall be not more than eight (8) inches from side of car.

One (1) near each side of each end of car on face of end-sill, projecting outward or downward. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application: Same as specified for "Box and other house cars."

## UNCOUPLING-LEVERS.

Same as specified for "Box and other house cars."

## END-LADDER CLEARANCE.

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-step, brake-wheel, or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

## DROP-END LOW-SIDE GONDOLA CARS.

## HAND-BRAKES.

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be so located on end of car to the left of center.

Manner of Application. Same as specified for "Box and other house cars," provided that top brake-shaft support may be omitted.

SILL-STEPS.

Same as specified for "Box and other house cars."

SIDE-HANDHOLDS.

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: Horizontal: One (1) near each end on each side of car, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, if car construction will permit, but handhold shall not project above top of side. Clearance of outer end of handhold shall be not more than eight (8) inches from end of car.

Manner of Application: Same as specified for "Box and other house cars."

END-HANDHOLDS.

Number: Four (4).

Dimensions: Same as specified for "Box and other house cars."

Location: Horizontal: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application: Same as specified for "Box and other house cars."

UNCOUPLING-LEVERS.

Same as specified for "Box and other house cars."

END-LADDER CLEARANCE.

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-wheel, or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

FLAT CARS.

*[Cars with sides twelve (12) inches or less above the floor may be equipped the same as flat cars.]*

HAND-BRAKES.

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: Each hand-brake shall be so located that it can be securely operated while car is in motion.

The brake-shaft shall be located on the end of car to the left of center, or on side of car not more than thirty-six (36) inches from right-hand end thereof.

Manner of Application: Same as specified for "Box and other house cars."

## SILL-STEPS.

Same as specified for "Box and other house cars."

## SIDE-HANDHOLDS.

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: Horizontal: One (1) on face of each side-sill near each end. Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

Manner of Application: Same as specified for "Box and other house cars."

## END-HANDHOLDS.

Number: Four (4).

Dimensions: Same as specified for "Box and other house cars."

Location: Horizontal: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application: Same as specified for "Box and other house cars."

## UNCOUPLING-LEVERS.

Same as specified for "Box and other house cars."

## TANK-CARS WITH SIDE-PLATFORMS.

## HAND-BRAKES.

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

Manner of Application: Same as specified for "Box and other house cars."

## SILL-STEPS.

Same as specified for "Box and other house cars."

## SIDE-HANDHOLDS.

Number: Four (4).

Dimensions: Same as specified for "Box and other house cars."

Location: Horizontal: One (1) on face of each side-sill near each end. Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

If side safety-railings are attached to tank or tank-bands, four (4) additional vertical handholds shall be applied, one (1) as nearly as possible over each sill-step and securely fastened to tank or tank-band.

Manner of Application: Same as specified for "Box and other house cars."

## END-HANDHOLDS.

Number: Four (4).

Dimensions: Same as specified for "Box and other house cars."

Location: Horizontal: One (1) near each side of each end of

car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application: Same as specified for "Box and other house cars."

#### TANK-HEAD HANDHOLDS.

Number: Two (2). [*Not required if safety-railings runs around ends of tank.*]

Dimensions: Minimum diameter five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel. Minimum clearance two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches. Clear length of handholds shall extend to within six (6) inches of outer diameter of tank at point of application.

Location: Horizontal: One (1) across each head of tank not less than thirty (30) nor more than sixty (60) inches above platform.

Manner of Application: Tank-head handholds shall be securely fastened.

#### SAFETY-RAILINGS.

Number: One (1) continuous safety-railing running around sides and ends of tank, securely fastened to tank or tank-bands at ends and sides of tank; or two (2) running full length of tank at sides of car supported by posts.

Dimensions: Not less than three-fourths ( $\frac{3}{4}$ ) of an inch, iron.

Location: Running full length of tank either at side supported by posts or securely fastened to tank or tank-bands, not less than thirty (30) nor more than sixty (60) inches above platform.

Manner of Application: Safety-railings shall be securely fastened to tank-body, tank-bands or posts.

#### UNCOUPLING-LEVERS.

Same as specified for "Box and other house cars."

#### END-LADDER CLEARANCE.

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-shaft brackets, brake wheel of uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

#### TANK CARS WITHOUT SIDE-SILLS AND TANK CARS WITH SHORT SIDE-SILLS AND END PLATFORMS.

##### HAND-BRAKES.

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

Manner of Application: Same as specified for "Box and other house cars."

#### RUNNING-BOARDS.

Number: One (1) continuous running-board around sides and ends; or two (2) running full length of tank, one (1) on each side.

Dimensions: Minimum widths on sides, ten (10) inches.

Minimum width on ends, six (6) inches.

Location: Continuous around sides and ends of cars. On tank cars having end platforms extending to bolsters, running-boards shall extend from center to center of bolsters, one (1) on each side.

Manner of Application: If side running-boards are applied below center of tank, outside edge of running-boards shall extend not less than seven (7) inches beyond bulge of tank.

The running-boards at ends of car shall be not less than six (6) inches from a point vertically above the inside face of knuckle when closed with coupler-horn against the buffer-block, end-sill or back-stop.

Running-boards shall be securely fastened to tank or tank-bands.

#### SILL-STEPS.

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: One (1) near each end on each side under side-hand-hold.

Outside edge of tread of step shall be not more than four (4) inches inside of face of side of car, preferably flush with side of car.

Tread shall be not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

Manner of Application: Same as specified for "Box and other house cars."

#### LADDERS.

*[If running-boards are so located as to make ladders necessary.]*

Number: Two (2) on cars with continuous running-boards.

Four (4) on cars with side running-boards.

Dimensions: Minimum clear length of tread, ten (10) inches.

Maximum spacing of treads, nineteen (19) inches.

Hardwood treads, minimum dimensions, one and one-half ( $1\frac{1}{2}$ ) by two (2) inches.

Wrought iron or steel treads, minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ) inches.

Location: On cars with continuous running-boards, one (1) at right end of each side.

On cars with side running-board, one (1) at each end of each running-board.

Manner of Application: Ladders shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts or rivets.

## SIDE-HANDHOLDS.

Number: Four (4) or more.

Dimensions: Same as specified for "Box and other house cars."

Location: Horizontal: One (1) on face of each side-sill near each end on tank cars with short side-sills, or one (1) attached to top of running-board projecting outward above sill-steps or ladders on tank cars without side-sills. Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

If side safety-railings are attached to tank or tank-bands four (4) additional vertical handholds shall be applied, one (1) as nearly as possible over each sill-step and securely fastened to tank or tank-band.

Manner of Application: Same as specified for "Box and other house cars."

## END-HANDHOLDS.

Number: Four (4).

Dimensions: Same as specified for "Box and other house cars."

Location: Horizontal: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application: Same as specified for "Box and other house cars."

## TANK-HEAD HANDHOLDS.

Number: Two (2). [*Not required of safety-railings runs around ends of tank.*]

Dimensions: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clearance two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

Location: Horizontal: One (1) across each head of tank not less than thirty (30) nor more than sixty (60) inches above platform on running-board. Clear length of handholds shall extend to within six (6) inches of outer diameter of tank at point of application.

Manner of Application: Tank-head handholds shall be securely fastened.

## SAFETY-RAILINGS.

Number: One (1) running around sides and ends of tank or two (2) running full length of tank.

Dimensions: Minimum diameter, seven-eighths ( $\frac{7}{8}$ ) of an inch, wrought iron or steel.

Minimum clearance, two and one-half ( $2\frac{1}{2}$ ) inches.

Location: Running full length of tank, not less than thirty (30) nor more than sixty (60) inches above platform or running-board.

Manner of Application: Safety-railings shall be securely fastened to tank or tank-bands and secured against end shifting.

## UNCOUPLING-LEVERS.

Same as specified for "Box and other house cars."



## END-LADDER CLEARANCE.

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-shaft brackets, brake-wheel, running-boards or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same, above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

## TANK CARS WITHOUT END-SILLS.

## HAND-BRAKES.

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: Each hand-brake shall be so located that it can be safely operated while car is in motion. The brake-shaft shall be located on end of car to the left of center.

Manner of Application: Same as specified for "Box and other house cars."

## BRAKE-STEP.

Same as specified for "Box and other house cars."

## RUNNING-BOARDS.

Number: One (1).

Dimensions: Minimum width on sides, ten (10) inches.

Minimum width on ends, six (6) inches.

Location: Continuous around sides and ends of tank.

Manner of Application: If running-boards are applied below center of tank, outside edge of running-boards shall extend not less than seven (7) inches beyond bulge of tank.

Running-boards at ends of car shall be not less than six (6) inches from a point vertically above the inside face of knuckle when closed with coupler-horn against the buffer-block, end-sill or back-stop.

Running-boards shall be securely fastened to tank or tank-bands.

## SILL-STEPS.

Number: Four (4). [*If tank has high running-boards, making ladders necessary, sill-steps must meet ladder requirements.*]

Dimensions: Same as specified for "Box and other house cars."

Location: One (1) near each end on each side, flush with outside edge of running-board as near end of car as practicable.

Tread not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

Manner of Application: Steps exceeding eighteen (18) inches in depth shall have an additional tread and be laterally braced.

Sill-steps shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over; or with one-half ( $\frac{1}{2}$ ) inch rivets.

SIDE-HANDHOLDS.

Number: Four (4) or more.

Dimensions: Same as specified for "Box and other house cars."

Location: Horizontal: One (1) near each end on each side of car over sill-step, on running board, not more than two (2) inches back from outside edge of running-board, projecting downward or outward.

Where such side-handholds are more than eighteen (18) inches from end of car, an additional handhold must be placed near each end on each side not more than thirty (30) inches above center line of coupler.

Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

If safety-railings are on tank, four (4) additional vertical handholds shall be applied, one (1) over each sill-step on tank.

Manner of Application: Same as specified for "Box and other house cars."

END-HANDHOLDS.

Number: Four (4).

Dimensions: Same as specified for "Box and other house cars."

Location: Horizontal: One (1) near each side on each end of car on running-board, not more than two (2) inches back from edge of running-board projecting downward or outward, or on end of tank not more than thirty (30) inches above center line of coupler.

Manner of Application: Same as specified for "Box and other house cars."

SAFETY-RAILINGS.

Number: One (1).

Dimensions: Minimum diameter, seven-eighths ( $\frac{7}{8}$ ) of an inch, wrought iron or steel.

Minimum clearance two and one-half ( $2\frac{1}{2}$ ) inches.

Location: Safety-railings shall be continuous around sides and ends of car, not less than thirty (30) nor more than sixty (60), inches above running-board.

Manner of Application: Safety-railings shall be securely fastened to tank or tank-bands, and secured against end shifting.

UNCOUPLING-LEVERS.

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars," *except* that minimum length of uncoupling-lever shall be forty-two (42) inches, measured from center line of end of car to handle of lever.

Location: Same as specified for "Box and other house cars," *except* that uncoupling-lever shall be not more than thirty (30) inches above center line of coupler.

END-LADDER CLEARANCE.

So part of car above buffer-block within thirty (30) inches from side of car, *except* brake-shaft, brake-shaft brackets, brake-wheel, brake-

wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or back-stop, and no other part of end of car or fixtures on same, above buffer-block, other than exceptions herein noted, shall extend beyond the face of buffer-block.

#### CABOOSE CARS WITH PLATFORMS.

##### HAND-BRAKES.

Number: Each caboose car shall be equipped with an efficient hand-brake which shall operate in harmony with the power-brake thereon.

The hand-brake may be of any efficient design, but must provide the same degree of safety as the design shown on Plate A.

Dimensions: Same as specified for "Box and other house cars."

Location: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft on caboose cars with platforms shall be located on platform to the left of center.

Manner of Application: Same as specified for "Box and other house cars."

##### RUNNING-BOARDS.

Number: One (1) longitudinal running-board.

Dimensions: Same as specified for "Box and other house cars."

Location: Full length of car, center of roof. [*On caboose cars with cupolas, longitudinal running-boards shall extend from cupola to ends of roof.*]

Outside-metal-roof cars shall have latitudinal extensions leading to ladder locations.

Manner of Application: Same as specified for "Box and other house cars."

##### LADDERS.

Number: Two (2).

Dimensions: None specified.

Location: One (1) on each end.

Manner of Application: Same as specified for "Box and other house cars."

##### ROOF-HANDHOLDS.

Number: One (1) over each ladder.

Where stiles of ladders extend twelve (12) inches or more above roof, no other roof-handholds are required.

Dimensions: Same as specified for "Box and other house cars."

Location: On roof of caboose, in line with the running parallel to treads of ladder, not less than eight (8) nor more than fifteen (15) inches from edge of roof.

Manner of Application: Same as specified for "Box and other house cars."

## CUPOLA-HANDHOLDS.

Number: One (1) or more.

Dimensions: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch wrought iron or steel.

Minimum clearance two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

Location: One (1) continuous handhold extending around top of cupola not more than three (3) inches from edge of cupola-roof.

Four (4) right-angle handholds, one (1) at each corner, not less than sixteen (16) inches in clear length from point of angle, may take the place of the one (1) continuous hand-hold specified, if locations coincide.

Manner of Application: Cupola-handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside and riveted over or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

## SIDE-HANDHOLDS.

Number: Four (4).

Dimensions: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, thirty-six (36) inches.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

Location: One (1) near each end on each side of car, curving downward toward center of car from a point not less than thirty (30) inches above platform to a point not more than eight (8) inches from bottom of car. Top end of handhold shall be not more than eight (8) inches from outside face of end-sheating.

Manner of Application: Same as specified for "Box and other house cars."

## END-HANDHOLDS.

Number: Four (4).

Dimensions: Same as specified for "Box and other house cars."

Location: Horizontal: One (1) near each side on each end of car on face of platform end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from end of platform end-sill.

Manner of Application: Same as specified for "Box and other house cars."

## END-PLATFORM HANDHOLDS.

Number: Four (4).

Dimensions: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

Location: One (1) right-angle handhold on each side of each end extending horizontally from door-post to corner of car at approximate height of platform-rail, then downward to within twelve (12) inches of bottom of car.

Manner of Application: Handholds shall be securely fastened with bolts, screws or rivets.

CABOOSE PLATFORM-STEPS.

Safe and suitable box steps leading to caboose platforms shall be provided at each corner of caboose.

Lower tread of step shall be not more than twenty-four (24) inches above top of rail.

UNCOUPLING-LEVERS.

Same as specified for "Box and other house cars."

CABOOSE CARS WITHOUT PLATFORMS.

HAND-BRAKES.

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft on caboose cars without platforms shall be located on end of car to the left of center.

Manner of Application: Same as specified for "Box and other house cars."

BRAKE-STEP.

Same as specified for "Box and other house cars."

RUNNING-BOARDS.

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: Full length of car, center of roof. [*On caboose cars with cupolas, longitudinal running-boards shall extend from cupola to ends of roof.*]

Outside-metal-roof cars shall have latitudinal extensions leading to ladder locations.

Manner of Application: Same as specified for "Box and other house cars."

SILL-STEPS.

Same as specified for "Box and other house cars."

SIDE-DOOR STEP.

Number: Two (2). [*if caboose has side-doors*].

Dimensions: Minimum length, five (5) feet.

Minimum width, six (6) inches.

Minimum thickness of tread, one and one-half (1½) inches.

Minimum height of back-stop, three (3) inches.

Minimum height from top of rail to top of tread, twenty-four (24) inches.

Location: One (1) under each side-door.

Manner of Application: Side-door steps shall be supported by two (2) iron brackets having a minimum cross-sectional area of seven-eighths (7/8) by three (3) inches or equivalent, each of which shall

be securely fastened to car by not less than two (2) three-fourths ( $\frac{3}{4}$ ) inch bolts.

#### LADDERS.

Number: Four (4).

Dimensions: Same as specified for "Box and other house cars."

Location: Same as specified for "Box and other house cars," *except* when caboose has side-doors, then side-ladders shall be located not more than eight (8) inches from doors.

Manner of Application: Same as specified for "Box and other house cars."

#### END-LADDER CLEARANCE.

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-wheel, brake-step, running-board, or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

#### ROOF-HANDHOLDS.

Number: Four (4).

Dimensions: Same as specified for "Box and other house cars."

Location: One (1) over each ladder, on roof in line with and running parallel to treads of ladder, not less than eight (8) nor more than fifteen (15) inches from edge of roof.

Where stiles of ladders extend twelve (12) inches or more above roof, no other roof-handholds are required.

Manner of Application: Roof-handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

#### CUPOLA-HANDHOLDS.

Number: One (1) or more.

Dimensions: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

Location: One (1) continuous cupola-handhold extending around top of cupola, not more than three (3) inches from edge of cupola roof.

Four (4) right-angle handholds, one (1) at each corner, not less than sixteen (16) inches in clear length from point of angle, may take the place of the one (1) continuous handhold specified, if locations coincide.

Manner of Application: Cupola-handhold shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside and riveted over or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

## SIDE-HANDHOLDS.

Number: Four (4).

Dimensions: Same as specified for "Box and other house cars."

Location: Horizontal: One (1) near each end on each side of car, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler. Clearance of outer end of handhold shall be not more than eight (8) inches from end of car.

Manner of Application: Same as specified for "Box and other house cars."

## SIDE-DOOR HANDHOLDS.

Number: Four (4): Two (2) curved, two (2) straight.

Dimensions: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clearance two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

Location: One (1) curved handhold, from a point at side of each door opposite ladder, not less than thirty-six (36) inches above bottom of car, curving away from door downward to a point not more than six (6) inches above bottom of car.

One (1) vertical handhold at ladder side of each door from a point not less than thirty-six (36) inches above bottom of car to a point not more than six (6) inches above level of bottom of door.

Manner of Application: Side-door handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

## HORIZONTAL END-HANDHOLDS.

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: Same as specified for "Box and other house cars," *except* that one (1) additional end-handhold shall be on each end of cars with platform end-sills as heretofore described, unless car has door in center of end. Said handhold shall be not less than twenty-four (24) inches in length, located near center of car, not less than thirty (30) nor more than sixty (60) inches above platform end-sill.

Manner of Application: Same as specified for "Box and other house cars."

## VERTICAL END-HANDHOLDS.

Same as specified for "Box and other house cars."

## UNCOUPLING-LEVERS.

Same as specified for "Box and other house cars."

## PASSENGER-TRAIN CARS WITH WIDE VESTIBULES.

## HAND-BRAKES.

Number: Each passenger-train car shall be equipped with an efficient hand-brake, which shall operate in harmony with the power-brake thereon.

Location: Each hand-brake shall be so located that it can be safely operated while car is in motion.

## SIDE-HANDHOLDS.

Number: Eight (8).

Dimensions: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, metal.

Minimum clear length, sixteen (16) inches.

Minimum clearance, one and one-fourth ( $1\frac{1}{4}$ ), preferably one and one-half ( $1\frac{1}{2}$ ), inches.

Location: Vertical: One (1) on each vestibule door-post.

Manner of Application: Side-handholds shall be securely fastened with bolts, rivets or screws.

## END-HANDHOLDS.

Number: Four (4).

Dimensions: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

Handholds shall be flush with or project not more than one (1) inch beyond vestibule face.

Location: Horizontal: One (1) near each side on each end projecting downward from face of vestibule end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application: End-handholds shall be securely fastened with bolts or rivets.

When marker-sockets or brackets are located so that they cannot be conveniently reached from platforms, suitable steps and handholds shall be provided for men to reach such sockets or brackets.

## UNCOUPLING-LEVERS.

Uncoupling attachments shall be applied so they can be operated by a person standing on the ground.

Minimum length of ground uncoupling attachment, forty-two (42) inches, measured from center line of end of car to handle of attachment.

On passenger-train cars used in freight or mixed-train service, the uncoupling attachments shall be so applied that the coupler can be operated from left side of car.

## PASSENGER-TRAIN CARS WITH OPEN END-PLATFORMS.

## HAND-BRAKES.

Number: Each passenger-train car shall be equipped with an efficient hand-brake, which shall operate in harmony with the power-brake thereon.

Location: Each hand-brake shall be so located that it can be safely operated while car is in motion.



## END-HANDHOLDS.

Number: Four (4).

Dimensions: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

Handholds shall be flush with or project not more than one (1) inch beyond face of end-sill.

Location: Horizontal: One (1) near each side of each end on face of platform end-sill, projecting downward. Clearance of outer end of handhold shall be not more than sixteen (16) inches from end of end-sill.

Manner of Application: End-handholds shall be securely fastened with bolts or rivets.

## END PLATFORM-HANDHOLDS.

Number: Four (4). [*Cars equipped with safety-gates do not require end platform-handholds.*]

Dimensions: Minimum clearance two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches metal.

Location: Horizontal from or near door-post to a point not more than twelve (12) inches from corner of car, then approximately vertical to a point not more than six (6) inches from top of platform. Horizontal portion shall be not less than twenty-four (24) inches in length nor more than forty (40) inches above platform.

Manner of application: End platform-handholds shall be securely fastened with bolts, rivets or screws.

## UNCOUPLING-LEVERS.

Uncoupling attachments shall be applied so they can be operated by a person standing on the ground.

Minimum length of ground uncoupling-attachment, forty-two (42) inches, measured from center of end of car to handle of attachment.

On passenger-train cars used in freight or mixed-train service the uncoupling attachments shall be so applied that the coupler can be operated from left side of car.

## PASSENGER-TRAIN CARS WITHOUT END-PLATFORMS.

## HAND-BRAKES.

Number: Each passenger-train car shall be equipped with an efficient hand-brake which shall operate in harmony with the power-brake thereon.

Location: Each hand-brake shall be so located that it can be safely operated while car is in motion.

## SILL-STEPS.

Number: Four (4).

Dimensions: Minimum length of tread (10), preferably twelve (12), inches.

Minimum cross-sectional area one-half ( $\frac{1}{2}$ ) by on and one-half ( $\frac{1}{2}$ ) inches or equivalent, wrought iron or steel.

Minimum clear depth eight (8) inches.

Location: One (1) near each end on each side not more than twenty-four (24) inches from corner of car to center of tread of sill-step.

Outside edge of tread of step shall be not more than two (2) inches inside of face of side of car.

Tread shall be not more than twenty-four (24), preferably not more than twenty-two (22), inches above top of rail.

Manner of Application: Steps exceeding eighteen (18) inches in depth shall have an additional tread and be laterally braced.

Sill-steps shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

#### SIDE-HANDHOLDS.

Number: Four (4).

Dimensions: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16), preferably twenty-four (24), inches.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

Location: Horizontal or vertical: One (1) near each end on each side of car over sill-step.

If horizontal, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler.

If vertical, lower end not less than eighteen (18) nor more than twenty-four (24) inches above center line of coupler.

Manner or Application: Side-handholds shall be securely fastened with bolts, rivets or screws.

#### END-HANDHOLDS.

Number: Four (4).

Dimensions: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

Location: Horizontal: One (1) near each side on each end projecting downward from face of end-sill or sheathing. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application: Handholds shall be flush with or project not more than one (1) inch beyond face of end-sill.

End-handholds shall be securely fastened with bolts or rivets.

When marker sockets or brackets are located so that they cannot be conveniently reached from platforms, suitable steps and handholds shall be provided for men to reach such sockets or brackets.

## END-HANDRAILS.

[On cars with projecting end-sills.]

Number: Four (4).

Dimensions: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

Location: One (1) on each side of each end, extending horizontally from door-post or vestibule-frame to a point not more than six (6) inches from corner of car, then approximately vertical to a point not more than six (6) inches from top of platform end-sill; horizontal portion shall be not less than thirty (30) nor more than sixty (60) inches above platform end-sill.

Manner of application: End-handrails shall be securely fastened with bolts, rivets or screws.

## SIDE-DOOR STEPS.

Number: One (1) under each door.

Dimensions: Minimum length of tread, ten (10), preferably twelve (12), inches.

Minimum cross-sectional area, one-half ( $\frac{1}{2}$ ) by one and one-half ( $1\frac{1}{2}$ ) inches or equivalent, wrought iron or steel.

Minimum clear depth, eight (8) inches.

Location: Outside edge of tread of step not more than two (2) inches inside of face of side of car.

Tread not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

Manner of Application: Steps exceeding eighteen (18) inches in depth shall have an additional tread and be laterally braced.

Side-door steps shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

A vertical handhold not less than twenty-four (24) inches in clear length shall be applied above each side-door step on door-post.

## UNCOUPLING-LEVERS.

Uncoupling attachments shall be applied so they can be operated by a person standing on the ground.

Minimum length of ground uncoupling attachment, forty-two (42) inches, measured from center line of end of car to handle of attachment.

On passenger-train cars used in freight or mixed-train service, the uncoupling attachment shall be so applied that the coupler can be operated from the left side of car.

## STEAM LOCOMOTIVES USED IN ROAD SERVICE.

## TENDER SILL-STEPS.

Number: Four (4) on tender.

Dimensions: Bottom tread not less than eight (8) by twelve (12) inches, metal.

[May have wooden treads.]

If stirrup-steps are used, clear length of tread shall be not less than ten (10), preferably twelve (12), inches.

Location: One (1) near each corner of tended on sides.

Manner of Application: Tender sill-steps shall be securely fastened with bolts or rivets.

#### PILOT SILL-STEPS.

Number: Two (2).

Dimensions: Tread not less than eight (8) inches in width by ten (10) inches in length, metal.

*[May have wooden treads.]*

Location: One (1) on or near each end of buffer-beam outside of rail and not more than sixteen (16) inches above rail.

Manner of Application: Pilot sill-steps shall be securely fastened with bolts or rivets.

#### PILOT-BEAM HANDHOLDS.

Number: Two (2).

Dimensions: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, fourteen (14), preferably sixteen (16), inches.

Minimum clearance, two and one-half ( $2\frac{1}{2}$ ) inches.

Location: One (1) on each end of buffer-beam.

*[If uncoupling-lever extends across front end of locomotive to within eight (8) inches of end of buffer-beam, and is seven-eighths ( $\frac{7}{8}$ ) of an inch or more in diameter, securely fastened, with a clearance of two and one-half ( $2\frac{1}{2}$ ) inches, it is a handhold.]*

Manner of Application: Pilot-beam handholds shall be securely fastened with bolts or rivets.

#### SIDE-HANDHOLDS.

Number: Six (6).

Dimensions: Minimum diameter, if horizontal, five-eighths ( $\frac{5}{8}$ ) of an inch; if vertical, seven-eighths ( $\frac{7}{8}$ ) of an inch, wrought iron or steel.

Horizontal, minimum clear length, sixteen (16) inches.

Vertical, clear length equal to approximate height of tank.

Minimum clearance two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

Location: Horizontal or vertical: If vertical, one (1) on each side of tender within six (6) inches of rear or on corner, of horizontal, same as specified for "Box and other house cars."

One (1) on each side of tender near gangway: one (1) on each side of locomotive at gangway; applied vertically.

Manner of Application: Side-handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts or rivets.

#### REAR-END HANDHOLDS.

Number: Two (2).

Dimensions: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch wrought iron or steel.

Minimum clear length, fourteen (14) inches.

Minimum clearance two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

Location: Horizontal: One (1) near each side of rear end of tender on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of tender.

Manner of Application: Rear-end handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts or rivets.

#### UNCOUPLING-LEVERS.

Number: Two (2) double levers, operative from either side.

Dimensions: Rear-end levers shall extend across end of tender with handles not more than twelve (12), preferably nine (9), inches from side of tender with a guard bent on handle to give not less than two (2) inches clearance around handle.

Location: One (1) on rear end of tender and one (1) on front end of locomotive.

Handles of front-end levers shall be not more than twelve (12), preferably nine (9), inches from ends of buffer-beam, and shall be so constructed as to give a minimum clearance of two (2) inches around handle.

Manner of Application: Uncoupling-levers shall be securely fastened with bolts or rivets.

#### COUPLERS.

Locomotives shall be equipped with automatic couplers at rear of tender and front of locomotive.

### STEAM LOCOMOTIVES USED IN SWITCHING SERVICE

#### FOOTBOARDS

Number: Two (2) or more.

Dimensions: Minimum width of tread, ten (10) inches, wood.

Minimum thickness of tread, one and one-half ( $1\frac{1}{2}$ ), preferably two (2), inches.

Minimum height of back-stop, four (4) inches above tread.

Height from top of rail to top of tread, not more than twelve (12) nor less than nine (9) inches.

Location: Ends or sides.

If on ends, they shall extend not less than eighteen (18) inches outside of gauge of straight track, and shall be not more than twelve (12) inches shorter than buffer-beam at each end.

Manner of Application: End footboards may be constructed in two (2) sections, *provided* that practically all space on each side of coupler is filled; each section shall be not less than three (3) feet in length.

Footboards shall be securely bolted to two (2) one (1) by four (4) inches metal brackets, *provided* footboard is not cut or notched at any point.

If footboard is cut or notched or in two (2) sections, not less than four (4) one (1) by three (3) inches metal brackets shall be

used, two (2) located on each side of coupler. Each bracket shall be securely bolted to buffer-beam, end-sill or tank-frame by not less than two (2) seven-eighths ( $\frac{7}{8}$ ) inch bolts.

If side footboards are used, a substantial handhold or rail shall be applied not less than thirty (30) inches nor more than sixty (60) inches above tread of footboard.

#### SILL-STEPS

Number: Two (2) or more.

Dimensions: Lower tread of step shall be not less than eight (8) by twelve (12) inches, metal. [*May have wooden treads.*]

If stirrup-steps are used, clear length of tread shall be not less than ten (10), preferably twelve (12), inches.

Location: One (1) or more on each side at each side at gangway secured to locomotive or tender.

Manner of Application: Sill-steps shall be securely fastened with bolts or rivets.

#### END-HANDHOLDS

Number: Two (2).

Dimensions: Minimum diameter, one (1) inch, wrought iron or steel.

Minimum clearance, four (4) inches, *except* at coupler casting or braces, when minimum clearance shall be two (2) inches.

Location: One (1) on pilot buffer-beam; one (1) on rear end of tender, extending across front end of locomotive and rear end of tender. Ends of handholds shall be not more than six (6) inches from ends of buffer-beam or end-sill, securely fastened at ends.

Manner of Application: End-handholds shall be securely fastened with bolts or rivets.

#### SIDE-HANDHOLDS

Number: Four (4).

Dimensions: Minimum diameter, seven-eighths ( $\frac{7}{8}$ ) of an inch, wrought iron or steel.

Clear length equal to approximate height of tank.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

Location: Vertical: One (1) on each side of tender near front corner; one (1) on each side of locomotive at gangway.

Manner of Application: Side-handholds shall be securely fastened with bolts or rivets.

#### UNCOUPLING-LEVERS

Number: Two (2) double levers, operative from either side.

Dimensions: Handles of front-end levers shall be not more than twelve (12), preferably nine (9), inches from ends of buffer-beam, and shall be so constructed as to give a minimum clearance of two (2) inches around handle.

Rear-end levers shall extend across end of tender with handles not more than twelve (12), preferably nine (9), inches from side of tender, with a guard bent on handle to give not less than two (2) inches clearance around handle.

Location: One (1) on rear end of tender and one (1) on front end of locomotive.

#### HANDRAILS AND STEPS FOR HEADLIGHTS

Switching-locomotive with sloping tenders with manhole or headlight located on sloping portion of tender shall be equipped with secure steps and handrail or with platform and handrail leading to such manhole or headlight.

#### END-LADDER CLEARANCE

No part of locomotive or tender *except* draft-rigging, coupler and attachments, safety-chains, buffer-block, footboard, brake pipe, signal-pipe, steam-heat pipe or arms of uncoupling-lever shall extend to within fourteen (14) inches of a vertical plane passing through the inside face of knuckle when closed with horn of coupler against buffer-block or end-sill.

#### COUPLERS

Locomotives shall be equipped with automatic couplers at rear of tender and front of locomotive.

#### SPECIFICATIONS COMMON TO ALL STEAM LOCOMOTIVES

##### HAND-BRAKES

Hand-brakes will not be required on locomotives nor on tenders when attached to locomotives.

If tenders are detached from locomotives and used in special service, they shall be equipped with efficient hand-brakes.

##### RUNNING-BOARDS

Number: Two (2).

Dimensions: Not less than ten (10) inches wide. If of wood, not less than one and one-half ( $1\frac{1}{2}$ ) inches in thickness; if of metal, not less than three-sixteenths ( $\frac{3}{16}$ ) of an inch, properly supported.

Location: One (1) on each side of boiler extending from cab to front end near pilot-beam. [*Running-boards may be in sections. Flat-top steam-chests may form section of running-board.*]

Manner of Application: Running boards shall be securely fastened with bolts, rivets or studs.

Locomotives having Wooten type boilers with cab located on top of boiler more than twelve (12) inches forward from boiler-head shall have suitable running-boards running from cab to rear of locomotive, with handrailings not less than twenty (20) nor more than forty-eight (48) inches above outside edge of running-boards, securely fastened with bolts, rivets or studs.

##### HANDRAILS

Number: Two (2) or more.

Dimensions: Not less than one (1) inch in diameter, wrought iron or steel.

Location: One (1) on each side of boiler extending from near cab to near front end of boiler; and extending across front end of

boiler, not less than twenty-four (24) nor more than sixty-six (66) inches above running-board.

Manner of Application: Handrails shall be securely fastened to boiler.

#### TENDERS OF VANDERBILT TYPE

Tenders known as the Vanderbilt type shall be equipped with running-boards; one (1) on each side of tender not less than ten (10) inches in width and one (1) on top of tender not less than forty-eight (48) inches in width, extending from coal space to rear of tender.

There shall be a handrail on each side of top running-board, extending from coal space to rear of tank, not less than one (1) inch in diameter and not less than twenty (20) inches in height above running-board from coal space to manhole.

There shall be a handrail extending from coal space to within twelve (12) inches of rear of tank, attached to each side of tank above side running-board, not less than thirty (30) nor more than sixty-six (66) inches above running-board.

There shall be one (1) vertical end-handhold on each side of Vanderbilt type of tender, located within eight (8) inches of rear of tank extending from within eight (8) inches of top of end-sill to within eight (8) inches of side handrail. Post supporting rear end of side running-board if not more than two (2) inches in diameter and properly located, may form section of handhold.

An additional horizontal end-handhold shall be applied on rear end of all Vanderbilt type of tenders which are not equipped with vestibules. Handhold to be located not less than thirty (30) nor more than sixty-six (66) inches above top of end-sill. Clear length of handhold to be not less than forty-eight (48) inches.

Ladders shall be applied at forward ends of side running-boards.

#### HANDBAILS AND STEPS FOR HEADLIGHTS

Locomotives having headlights which can not be safely and conveniently reached from pilot-beam or steam-chests shall be equipped with secure handrails and steps suitable for the use of men in getting to and from such headlights.

A suitable metal end or side-ladder shall be applied to all tanks more than forty-eight (48) inches in height, measured from the top of end-sill, and securely fastened with bolts or rivets.

#### COUPLERS

Locomotives shall be equipped with automatic couplers at rear of tender and front of locomotive.

Cars of construction not covered specifically in the foregoing sections, relative to handholds, sill-steps, ladders, hand-brakes, and running-boards may be considered as of special construction, but shall have, as nearly as possible, the same complement of handholds, sill-steps, ladders, hand-brakes and running-boards as are required for cars of the nearest approximate type.

"RIGHT" or "LEFT" refers to side of person when facing end or side of car from ground.



To provide for the usual inaccuracies of manufacturing and for wear, where sizes of metal are specified, a total variation of five (5) per cent below size given is permitted.

*And it is further ordered,* That a copy of this order be at once served on all common carriers, subject to the provisions of said act, in a sealed envelope by registered mail.

## ORDER OF THE INTERSTATE COMMERCE COMMISSION,

MARCH 13, 1911

In the matter of the extension of the period within which common carriers shall comply with the requirements of an act entitled, "An act to supplement 'an act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes and for other purposes,' and other safety appliance acts, and for other purposes," approved April 14, 1910, as amended by "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1912, and for other purposes," approved March 4, 1911.

Whereas, pursuant to the provisions of the act above stated, the Interstate Commerce Commission, by its order duly made and entered on October 13, 1910, and March 13, 1911, has designated the number, dimensions, location, and manner of application of the appliances provided for by section 2 of the act aforesaid and section 4 of the act of March 2, 1893, as amended April 1, 1896, and March 2, 1903, known as the "Safety Appliance Acts;" and whereas the matter of extending the period within which common carriers shall comply with the provisions of section 2 of the act first aforesaid being under consideration, upon full hearing and for good cause shown:

*It is ordered*, That the period of time within which said common carriers shall comply with the provisions of section 3 of said act in respect of the equipment of cars in service on the 1st day of July, 1911, be, and the same is hereby, extended as follows, to-wit:

## FREIGHT-TRAIN CARS.

(a) Carriers are not required to change the brakes from right to left side on steel or steel-underframe cars with platform end sills, or to change the end-ladders on such cars, except when such appliances are renewed, at which time they must be made to comply with the standards prescribed in said order of March 13, 1911.

(b) Carriers are granted an extension of five years from July 1, 1911, to change the location of brakes on all cars other than those designated in paragraph (a) to comply with the standards prescribed in said order.

(c) Carriers are granted an extension of five years from July 1, 1911, to comply with the standards prescribed in said order in respect of all brake specifications contained therein, other than those designated in paragraphs (a) and (b), on cars of all classes.

(d) Carriers are not required to make changes to secure additional end-ladder clearance on cars that have ten or more inches end-ladder clearance, within thirty inches of side of car, until car is shopped for work amounting to practically rebuilding body of car, at which time they must be made to comply with the standards prescribed in said order.

(e) Carriers are granted an extension of five years from July 1, 1911, to change cars having less than ten inches end-ladder clearance, within thirty inches of side of car, to comply with the standards prescribed in said order.

(f) Carriers are granted an extension of five years from July 1, 1911, to change and apply all other appliances on freight-train cars to comply with the standards prescribed in said order, except that when a car is shopped for work amounting to practically rebuilding body of car, it must then be equipped according to the standards prescribed in said order in respect to handholds, running boards, ladders, sill steps, and brake staffs: *Provided*, That the extension of time herein granted is not to be construed as relieving carriers from complying with the provisions of section 4 of the act of March 2, 1893, as amended April 1, 1896, and March 2, 1903.

(g) Carriers are not required to change the location of handholds (except end handholds under end sills), ladders, sill steps, brake wheels, and brake staffs on freight train cars where the appliances are within three inches of the required location, except that when cars undergo regular repairs they must then be made to comply with the standards prescribed in said order.

#### PASSENGER-TRAIN CARS

(h) Carriers are granted an extension of three years from July 1, 1911, to change passenger-train cars to comply with the standards prescribed in said order.

#### LOCOMOTIVES, SWITCHING

(i) Carriers are granted an extension of one year from July 1, 1911, to change switching locomotives to comply with the standards prescribed in said order.

#### LOCOMOTIVES, OTHER THAN SWITCHING

(j) Carriers are granted an extension of two years from July 1, 1911, to change all locomotives of other classes to comply with the standards prescribed in said order.

#### ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its office in Washington, D. C., on the 1st day of February, A. D., 1918.

No. 33 (Ex Parte).

#### SAFETY APPLIANCES.

*It appearing*, That by paragraphs (b), (c), (e) and (f) of an order dated March 13, 1911, and by orders dated November 2, 1915, and April 12, 1917, which orders are hereby referred to and made a part hereof, the Commission extended to March 1, 1918, the period within which common carriers shall make their freight cars actually in service on July 1, 1911, conform to certain of the standards of equipment prescribed by the Commission pursuant to the provisions of section 3 of the act to supplement the safety appliance acts, approved April 14, 1910, as amended March 4, 1911;

*It further appearing*, That certain railroad companies have made application for further extension of the period within which they shall make their freight cars actually in service on July 1, 1911, conform to the standards of equipment prescribed by the Commission as aforesaid; and full hearing having been had on such application, and good cause having been shown for a further extension of such period:

*It is ordered*, That the period heretofore granted to common carriers subject to the act above stated by paragraphs (b), (c), (e), and (f) of the said order of March 13, 1911, and by the said orders of November 2, 1915, and April 12, 1917, within which to make their freight cars conform to certain of the standards of equipment prescribed by the Commission be, and it is hereby, extended for further period of 18 months from March 1, 1918, or until September 1, 1919.

*And it is further ordered*, That a copy of this order be served upon all common carriers subject to said act.

By the Commission:

(SEAL)

GEORGE B. MCGINTY,  
Secretary.

## APPENDIX I.

### THE FEDERAL HOURS OF SERVICE ACT.

AN ACT to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon.

Sec. 1. That the provisions of this Act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "employees" as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train.

Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: *Provided*, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period or not exceeding three days in any week: *Provided further*, The Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

Sec. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty in violation of the second section hereof shall be liable to a

penalty of not less than \$100 nor more than \$500 for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violations shall have been committed; and it shall be the duty of such district attorney to bring such suit upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorney information of any such violations as may come to its knowledge. In all prosecutions under this act the common carrier shall be deemed to have knowledge of all acts of all its officers and agents: *Provided*, That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen; *Provided further*, That the provisions of this act shall not apply to the crews of wrecking or relief trains. That nothing in this act shall affect, or be held to affect, any suit that may be instituted for recovery of penalty for violation of the act hereby amended occurring prior to the approval of this act, or any suit for such penalty or growing out of alleged violation of the act hereby amended which may be pending in any court at the time of the approval of this act.

Sec. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this act.

Sec. 5. That this act shall take effect and be in force one year after its passage.

## APPENDIX J.

### THE FEDERAL BOILER INSPECTION ACT.

An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto.

Section 1. The provisions of this act shall apply to any common carrier or carriers, their officers, agents, and employes, engaged in the transportation of passengers or property by railroad in the District of Columbia, or in any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad" as used in this act shall include all the roads in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and the term "employes" as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train.

Sec. 2. From and after the first day of July, nineteen hundred and eleven, it shall be unlawful for any common carrier, its officers or agents, subject to this act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb, and all boilers shall be inspected from time to time in accordance with the provisions of this act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

Sec. 3. There shall be appointed by the President, by and with the advice and consent of the Senate, a chief inspector and two assistant chief inspectors of locomotive boilers, who shall have general superintendence of the inspectors hereinafter provided for, direct them in the duties hereby imposed upon them, and see that the requirements of this act and the rules, regulations, and instructions made or given hereunder are observed by common carriers subject thereto. The said chief inspector and his two assistants shall be selected with reference to their practical knowledge of the construction and repairing of boilers, and to their fitness and ability to systematize and carry into effect the provisions hereof relating to the inspection and maintenance of locomotive boilers. The chief inspector shall receive a salary of four thousand dollars per year and the assistant chief inspectors shall each receive a salary of three thousand dollars per year; and each of the three shall be paid his traveling expenses incurred in the performance of his duties. The office of the chief inspector shall be in Wash-

(1635)

ington, District of Columbia, and the Interstate Commerce Commission shall provide such stenographic and clerical help as the business of the offices of the chief inspector and his assistants may require.

Sec. 4. Immediately after his appointment and qualification the chief inspector shall divide the territory comprising the several States, the Territories of New Mexico and Arizona, and the District of Columbia into fifty locomotive boiler-inspection districts, so arranged that the service of the inspector appointed for each district shall be most effective, and so that the work required of each inspector shall be substantially the same. Thereupon there shall be appointed by the Interstate Commerce Commission fifty inspectors of locomotive boilers. Said inspectors shall be in the classified service and shall be appointed after competitive examination according to the law and the rules of the Civil Service Commission governing the classified service. The chief inspector shall assign one inspector so appointed to each of the districts hereinafter named. Each inspector shall receive a salary of one thousand eight hundred dollars per year and his traveling expenses while engaged in the performance of his duty. He shall receive in addition thereto an annual allowance for office rent, stationery, and clerical assistance, to be fixed by the Interstate Commerce Commission, but not to exceed in the case of any district inspector six hundred dollars per year. In order to obtain the most competent inspectors possible, it shall be the duty of the chief inspector to prepare a list of questions to be propounded to applicants with respect to construction, repair, operation, testing, and inspection of locomotive boilers, and their practical experience in such work, which list, being approved by the Interstate Commerce Commission, shall be used by the Civil Service Commission as a part of its examination. No person interested, either directly or indirectly in any patented article required to be used on any locomotive under supervision or who is intemperate in his habits shall be eligible to hold the office of either chief inspector or assistant or district inspector.

Sec. 5. Each carrier subject to this act shall file its rules and instructions for the inspection of locomotive boilers with the chief inspector within three months after the approval of this act, and after hearing and approval by the Interstate Commerce Commission, such rules and instructions, with such modifications as the commission requires, shall become obligatory upon such carrier: *Provided, however,* That if any carrier subject to this act shall fail to file its rules and instructions the chief inspector shall prepare rules and instructions not inconsistent herewith for the inspection of locomotive boilers, to be observed by such carrier; which rules and instructions, being approved by the Interstate Commerce Commission, and a copy thereof being served upon the president, general manager, or general superintendent of such carrier, shall be obligatory, and a violation thereof punished as hereinafter provided: *Provided also,* That such common carrier may from time to time change the rules and regulations herein provided for, but such change shall not take effect and the new rules and regulations be in force until the same shall have been filed with and approved by the



Interstate Commerce Commission. The chief inspector shall also make all needful rules, regulations and instructions not inconsistent herewith for the conduct of his office and for the government of the district inspectors: *Provided, however,* That all such rules and instructions shall be approved by the Interstate Commerce Commission before they take effect.

Sec. 6. It shall be the duty of each inspector to become familiar, so far as practicable, with the condition of each locomotive boiler ordinarily housed or repaired in his district, and if any locomotive is ordinarily housed or repaired in two or more districts, then the chief inspector or an assistant shall make such division between inspectors as will avoid the necessity for duplication of work. Each inspector shall make such personal inspection of the locomotive boilers under his care from time to time as may be necessary to fully carry out the provisions of this act, and as may be consistent with his other duties, but he shall not be required to make such inspections at stated times or at regular intervals. His first duty shall be to see that the carriers make inspections in accordance with the rules and regulations established or approved by the Interstate Commerce Commission, and that carriers repair the defects which such inspections disclose before the boiler or boilers or appurtenances pertaining thereto are again put in service. To this end each carrier subject to this act shall file with the inspector in charge, under the oath of the proper officer or employee, a duplicate of the report of each inspection required by such rules and regulations, and shall also file with such inspector, under the oath of the proper officer or employee, a report showing the repair of the defects disclosed by the inspection. The rules and regulations hereinbefore provided for shall prescribe the time at which such reports shall be made. Whenever any district inspector shall, in the performance of his duty, find any locomotive boiler or apparatus pertaining thereto not conforming to the requirements of the law or the rules and regulations established and approved as hereinbefore stated, he shall notify the carrier in writing that the locomotive is not in serviceable condition, and thereafter such boiler shall not be used until in serviceable condition: *Provided,* That a carrier, when notified by an inspector in writing that a locomotive boiler is not in serviceable condition, because of defects set out and described in said notice, may within five days after receiving said notice, appeal to the chief inspector by telegraph or by letter to have said boiler reexamined, and upon receipt of the appeal from the inspector's decision, the chief inspector shall assign one of the assistant chief inspectors or any district inspector other than the one from whose decision the appeal is taken to reexamine and inspect said boiler within fifteen days from date of notice. If upon such reexamination the boiler is found in serviceable condition, the chief inspector shall immediately notify the carrier in writing, whereupon such boiler may be put into service without further delay; but if the reexamination of said boiler sustains the decision of the district inspector, the chief inspector shall at once notify the carrier owning or operating such locomotive that the ap-

peal from the decision of the inspector is dismissed, and upon the receipt of such notice the carrier may, within thirty days, appeal to the Interstate Commerce Commission, and upon such appeal, and after hearing, said Commission shall have power to revise, modify, or set aside such action of the chief inspector and declare that said locomotive is in serviceable condition and authorize the same to be operated: *Provided further*, That pending either appeal the requirements of the inspector shall be effective.

Sec. 7. The chief inspector shall make an annual report to the Interstate Commerce Commission of the work done during the year, and shall make such recommendations for the betterment of the service as he may desire.

Sec. 8. In the case of accident resulting from failure from any cause of a locomotive boiler or its appurtenances, resulting in serious injury or death to one or more persons, a statement forthwith must be made in writing of the fact of such accident, by the carrier owning or operating said locomotive, to the chief inspector. Whereupon the facts concerning such accident shall be investigated by the chief inspector or one of his assistants, or such inspector as the chief inspector may designate for that purpose. And where the locomotive is disabled to the extent that it can not be run by its own steam, the part or parts affected by the said accident shall be preserved by said carrier intact, so far as possible, without hindrance or interference to traffic until after said inspection. The chief inspector or an assistant or the designated inspector making the investigation shall examine or cause to be examined thoroughly the boiler or part affected, making full and detailed report of the cause of the accident to the chief inspector.

The Interstate Commerce Commission may at any time call upon the chief inspector for a report of any accident embraced in this section, and upon the receipt of said report, if it deems it to the public interest, make reports of such investigations, stating the cause of accident, together with such recommendations as it deems proper. Such reports shall be made public in such manner as the commission deems proper. Neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation.

Sec. 9. Any common carrier violating this act or any rule or regulation made under its provisions or any lawful order of any inspector shall be liable to a penalty of one hundred dollars for each and every such violation; to be recovered in a suit or suits to be brought by the United States attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such attorneys subject to the direction of the Attorney General, to bring such suits upon duly verified information being lodged with them, respectively, of such violations having occurred; and it shall be the duty of the chief inspector of locomotive boilers to give information to the proper

United States attorney of all violations of this act coming to his knowledge.

Sec. 10. The total amounts directly appropriated to carry out the provisions of this act shall not exceed for any one fiscal year the sum of three hundred thousand dollars.

Amendment of 1915 to Federal Boiler Inspection Act.

Sec. 1. That section two of the Act entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto," approved February seventeenth, nineteen hundred and eleven, shall apply to and include the entire locomotive and tender and all parts and appurtenances thereof.

Sec. 2. That the chief inspector and the two assistant chief inspectors, together with all the district inspectors, appointed under the Act of February seventeenth, nineteen hundred and eleven, shall inspect and shall have the same powers and duties with respect to all the parts and appurtenances of the locomotive and tender that they now have with respect to the boiler of a locomotive and the appurtenances thereof, and the said Act of February seventeenth, nineteen hundred and eleven, shall apply to and include the entire locomotive and tender and all their parts with the same force and effect as it now applies to locomotive boilers and their appurtenances. That upon the passage of this Act all inspectors and applicants for the position of inspector shall be examined touching their qualifications and fitness with respect to the additional duties imposed by this Act.

Sec. 3. That nothing in this Act shall be held to alter, amend, change, repeal, or modify any other Act of Congress than the said Act of February seventeenth, nineteen hundred and eleven, to which reference is herein specifically made, or any order of the Interstate Commerce Commission promulgated under the safety appliance Act of March second, eighteen hundred and ninety-three, and supplemental Acts.

Sec. 4. That this Act shall take effect six months after its passage, except as otherwise herein provided.

Approved, March 4, 1915.

## APPENDIX K.

### RULES AND ORDERS OF INTERSTATE COMMERCE COMMISSION UNDER BOILER INSPECTION ACT.

#### ORDER.

At a General Session of the *Interstate Commerce Commission*, held at its office in Washington, D. C., on the 2d day of June, A. D. 1911.

#### *Present:*

JUDSON C. CLEMENTS,  
CHARLES A. PROUTY,  
FRANKLIN K. LANE,

#### Commissioners.

EDGAR E. CLARK,  
JAMES S. HARLAN,  
CHARLES C. MCCORD,  
BALTHASAR H. MEYER,

*In The Matter of the Preparation, Approval, and Establishment of Rules and Instructions for the Inspection and Testing of Locomotive Boilers and Their Appurtenances.*

Whereas the fifth section of the act of Congress approved February 17, 1911, entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto," provides, among other things, "that each carrier subject to this act shall file its rules and instructions for the inspection of locomotive boilers with the chief inspector within three months after the approval of this act, and after hearing and approval by the Interstate Commerce Commission, such rules and instructions, with such modifications as the Commission requires, shall become obligatory upon such carrier: *Provided, however,* That if any carrier subject to this act shall fail to file its rules and instructions the chief inspector shall prepare rules and instructions not inconsistent herewith for the inspection of locomotive boilers, to be observed by such carrier; which rules and instructions being approved by the Interstate Commerce Commission, and a copy thereof being served on the president, general manager, or general superintendent of such carrier, shall be obligatory and a violation thereof punished as hereinafter provided;" and

Whereas at the expiration of the period of three months after the approval of said act many of the common carriers subject to the provisions thereof had failed to file their rules and instructions for the inspection of locomotive boilers with the chief inspector; and

Whereas the chief inspector thereupon proceeded to prepare for submission to the Interstate Commerce Commission for its approval rules and instructions for the inspection and testing of locomotive boilers and their appurtenances for such carriers so failing to file the same; and

Whereas upon due notice there came on a hearing before the Interstate Commerce Commission in the matter of the approval and establishment of the rules and instructions prepared by the said chief inspector, on the 29th day of May, 1911; and

Whereas such carriers as had filed their rules and instructions for the inspection and testing of locomotive boilers and their appurtenances with the chief inspector within three months after the passage of said act asked, through their representatives at said hearing, that such of said rules and instructions which did not fulfill the requirements of the proposed rules and instruction prepared by the chief inspector be modified to the extent necessary to conform thereto, and that such of said rules and instructions as prescribed a higher standard than that required by the rules and instructions prepared by the chief inspector be regarded as withdrawn from consideration, and joined in a request that such rules and regulations as had been prepared by the chief inspector and approved by the Interstate Commerce Commission be established with uniformity for them and all other carriers subject to the act; and

Whereas at the hearing foresaid the rules and instructions prepared by the chief inspector were submitted to the Commission for its approval and all parties appearing at said hearing were fully heard in respect to the matters involved, and said proposed rules and instructions having been fully considered by the Commission:

*It is ordered*, That said rules and instructions for the inspection and testing of locomotive boilers and their appurtenances, as follows, be, and the same are hereby, approved, and from and after the 1st day of July, 1911, shall be observed by each and every common carrier subject to the provisions of the act of Congress aforesaid as the minimum requirements: *Provided*, That nothing herein contained shall be construed as prohibiting any carrier from enforcing additional rules and instructions not inconsistent with the foregoing, tending to a greater degree of precaution against accidents.

#### INTERSTATE COMMERCE COMMISSION.

##### DIVISION OF

#### LOCOMOTIVE INSPECTION.

#### Rules and Instructions for Inspection and Testing of Locomotive Boilers and Their Appurtenances.

Approved by orders of the Interstate Commerce Commission, dated June 2, 1911, September 12, 1912, and June 9, 1914.

#### RESPONSIBILITY FOR THE GENERAL CONSTRUCTION AND SAFE WORKING PRESSURE.

1. The railroad company will be held responsible for the general design and construction of the locomotive boilers under its control. The safe working pressure for each locomotive boiler shall be fixed

by the chief mechanical officer of the company or by a competent mechanical engineer under his supervision, after full consideration has been given to the general design, workmanship, age, and condition of the boiler, and shall be determined from the minimum thickness of the shell plates, the lowest tensile strength of the plates the efficiency of the longitudinal joint, the inside diameter of the course, and the lowest factor of safety allowed.

#### FACTOR OF SAFETY.

2. (a) The lowest factor of safety to be used for locomotive boilers constructed after January 1, 1912, shall be 4.

(b) The lowest factor of safety to be used for locomotive boilers which were in service or under construction prior to January 1, 1912, shall be as follows:

(c) Effective January 1, 1915, the lowest factor shall be 3, except that upon application this period may be extended not to exceed one year, if an investigation shows that conditions warrant it.

Effective January 1, 1916, the lowest factor shall be 3.25.

Effective January 1, 1917, the lowest factor shall be 3.5.

Effective January 1, 1919, the lowest factor shall be 3.75.

Effective January 1, 1921, the lowest factor shall be 4.

3. (a) *Maximum allowable stress on stays and braces.*—For locomotives constructed after January 1, 1915, the maximum allowable stress per square inch of net cross sectional area on fire box and combustion chamber stays shall be 7,500 pounds. The maximum allowable stress per square inch of net cross sectional area on round, rectangular, or gusset braces shall be 9,000 pounds.

(b) For locomotives constructed prior to January 1, 1915, the maximum allowable stress on stays and braces shall meet the requirements of rule No. 2, except that when a new fire box and wrapper sheet are applied to such locomotives they shall be made to meet the requirements of rule No. 3.

#### TENSILE STRENGTH OF MATERIAL.

4. When the tensile strength of steel or wrought iron shell plates is not known, it shall be taken at 50,000 pounds for steel and 45,000 pounds for wrought iron.

#### SHEARING STRENGTH OF RIVETS.

5. The maximum shearing strength of rivets per square inch of cross sectional area shall be taken as follows:

	Pounds.
Iron rivets in single shear .....	38,000
Iron rivets in double shear .....	76,000
Steel rivets in single shear .....	44,000
Steel rivets in double shear .....	88,000

6. A higher shearing strength may be used for rivets when it can be shown by test that the rivet material used is of such quality as to justify a higher allowable shearing strength.

## RULES FOR INSPECTION

7. The mechanical officer in charge at each point where boiler work is done will be held responsible for the inspection and repair of all locomotive boilers and their appurtenances under his jurisdiction. He must know that all defects disclosed by any inspection are properly repaired before the locomotive is returned to service.

8. The term "inspector" as used in these rules and instructions, unless otherwise specified, will be held to mean the railroad company's inspector.

## INSPECTION OF INTERIOR OF BOILER

9. *Time of inspection.*—The interior of every boiler shall be thoroughly inspected before the boiler is put into service and whenever a sufficient number of flues are removed to allow examination.

10. *Flues to be removed.*—All flues of boilers in service except as otherwise provided shall be removed at least once every three years, and a thorough examination shall be made of the entire interior of the boiler. After flues are taken out the inside of the boiler must have the scale removed and be thoroughly cleaned. This period for the removal of flues may be extended upon application if an investigation shows that conditions warrant it.

11. *Method of inspection.*—The entire interior of the boiler must then be examined for cracks, pitting, grooving, or indications of overheating and for damage where mud has collected or heavy scale formed. The edges of plates, all laps, seams, and points where cracks and defects are likely to develop or which an exterior examination may have indicated, must be given an especially minute examination. It must be seen that braces and stays are taut, that pins are properly secured in place, and that each is in condition to support its proportion of the load.

12. *Repairs.*—Any boiler developing cracks in the barrel shall be taken out of service at once, thoroughly repaired, and reported to be in satisfactory condition before it is returned to service.

13. *Lap joint seams.*—Every boiler having lap joint longitudinal seams without reinforcing plates shall be examined with special care to detect grooving or cracks at the edges of the seams.

14. *Fusible plugs.*—If boilers are equipped with fusible plugs they shall be removed and cleaned of scale at least once every month. Their removal must be noted on the report of inspection.

## INSPECTION OF EXTERIOR OF BOILER

15. *Time of inspection.*—The exterior of every boiler shall be thoroughly inspected before the boiler is put into service and whenever the jacket and the lagging are removed.

16. *Lagging to be removed.*—The jacket and lagging shall be removed at least once every five years and a thorough inspection made of the entire exterior of the boiler. The jacket and lagging shall also be removed whenever, on account of indications of leaks, the United States inspector or the railroad company's inspector considers it desirable or necessary.

## TESTING BOILERS

17. *Time of testing.*—Every boiler, before being put into service and at least once every 12 months thereafter, shall be subjected to hydrostatic pressure 25 per cent above the working steam pressure.

18. *Removal of dome cap.*—The dome cap and throttle standpipe must be removed at the time of making the hydrostatic test and the interior surface and connections of the boiler examined as thoroughly as conditions will permit. In case the boiler can be entered and thoroughly inspected without removing the throttle standpipe the inspector may make the inspection by removing the dome cap only, but the variation from the rule must be noted in the report of inspection.

19. *Witness of test.*—When the test is being made by the railroad company's inspector, an authorized representative of the company, familiar with boiler construction, must personally witness the test and thoroughly examine the boiler while under hydrostatic pressure.

20. *Repairs and steam test.*—When all necessary repairs have been completed, the boiler shall be fired up and the steam pressure raised to not less than the allowed working pressure, and the boiler and appurtenances carefully examined. All cocks, valves, seams, bolts, and rivets must be tight under this pressure and all defects disclosed must be repaired.

## STAYBOLT TESTING

21. *Time of testing rigid bolts.*—All staybolts shall be tested at least once each month. Staybolts shall also be tested immediately after every hydrostatic test.

22. *Method of testing rigid bolts.*—The inspector must tap each bolt and determine the broken bolts from the sound or the vibration of the sheet. If staybolt tests are made when the boiler is filled with water, there must be not less than 50 pounds pressure on the boiler. Should the boiler not be under pressure, the test may be made after draining all water from the boiler, in which case the vibration of the sheet will indicate any unsoundness. The latter test is preferable.

23. *Methods of testing flexible staybolts with caps.*—All flexible staybolts having caps over the outer ends shall have the caps removed at least once every 18 months and also whenever the United States inspector or the railroad company's inspector considers the removal desirable in order to thoroughly inspect the staybolts. The firebox sheets should be examined carefully at least once a month to detect any bulging or indications of broken staybolts.

24. *Method of testing flexible staybolts without caps.*—Flexible staybolts which do not have caps shall be tested once each month the same as rigid bolts.

Each time a hydrostatic test is applied such staybolt test shall be made while the boiler is under hydrostatic pressure, not less than the allowed working pressure, and proper notation of such test made on Form No. 3.

25. *Broken staybolts.*—No boiler shall be allowed to remain in service when there are two adjacent staybolts broken or plugged in any part of the firebox or combustion chamber, nor when three or



more are broken or plugged in a circle 4 feet in diameter, nor when five or more are broken or plugged in the entire boiler.

26. *Telltale holes*.—All staybolts shorter than 8 inches applied after July 1, 1911, except flexible bolts, shall have telltale holes three-sixteenths inch in diameter and not less than  $1\frac{1}{4}$  inches deep in the other end. These holes must be kept open at all times.

27. All staybolts shorter than 8 inches, except flexible bolts and rigid bolts which are behind frames and braces, shall be drilled when the locomotive is in the shop for heavy repairs and this work must be completed prior to July 1, 1914.

#### STEAM GAUGES

28. *Location of gauges*.—Every boiler shall have at least one steam gauge which will correctly indicate the working pressure. Care must be taken to locate the gauge so that it will be kept reasonably cool, and can be conveniently read by the enginemen.

29. *Siphon*.—Every gauge shall have a siphon of ample capacity to prevent steam entering the gauge. The pipe connection shall enter the boiler direct and shall be maintained steam tight between boiler and gauge. The siphon pipe and its connections to the boiler must be cleaned each time the gauge is tested.

30. *Time of testing*.—Steam gauges shall be tested at least once every three months and also when any irregularity is reported.

31. *Method of testing*.—Steam gauges shall be compared with an accurate test gauge or dead weight tester and gauges found inaccurate shall be corrected before being put into service.

32. *Badge plates*.—A metal badge plate showing the allowed steam pressure shall be attached to the boiler head in the cab. If boiler head is lagged, the lagging and jacket shall be cut away so that the plate can be seen.

33. *Boiler number*.—The builder's number of the boiler, if known, shall be stamped on the dome. If the builder's number of the boiler can not be obtained, an assigned number which shall be used in making out specification cards shall be stamped on the dome.

#### SAFETY VALVES

34. *Number and capacity*.—Every boiler shall be equipped with at least two safety valves, the capacity of which shall be sufficient to prevent, under any conditions of service, an accumulation of pressure more than 5 per cent above the allowed steam pressure.

35. *Setting of safety valves*.—Safety valves shall be set to pop at pressures not exceeding 6 pounds above the working steam pressure. When setting safety valves two steam gauges shall be used, one of which must be so located that it will be in full view of the person engaged in setting such valves; and if the pressure indicated by the gauges varies more than 3 pounds they shall be removed from the boiler, tested, and corrected before the safety valves are set. Gauges shall in all cases be tested immediately before the safety valves are set or any change made in the setting. When setting safety valves the water level in the boiler shall not be above the highest gauge cock.

36. *Time of testing.*—Safety valves shall be tested under steam at least once every three months, and also when any irregularity is reported.

#### WATER GLASS AND GAUGE COCKS.

37. *Number and location.*—Every boiler shall be equipped with at least one water glass and three gauge cocks. The lowest gauge cock and the lowest reading of the water glass shall be not less than 3 inches above the highest part of the crown sheet. Locomotives which are not now equipped with water glasses shall have them applied on or before July 1, 1912.

38. *Water glass valves.*—All water glasses shall be supplied with two valves or shutoff cocks, one at the upper and one at the lower connection to the boiler, and also a drain cock, so constructed and located that they can be easily opened and closed by hand.

39. *Time of cleaning.*—The spindles of all gauge cocks and water glass cocks shall be removed and cocks thoroughly cleaned of scale and sediment at least once each month.

40. All water glasses must be blown out and gauge cocks tested before each trip and gauge cocks must be maintained in such condition that they can be easily opened and closed by hand without the aid of a wrench or other tool.

41. *Water and lubricator glass shields.*—All tubular water glasses and lubricator glasses must be equipped with a safe and suitable shield which will prevent the glass from flying in case of breakage, and such shield shall be properly maintained.

42. *Water glass lamps.*—All water glasses must be supplied with a suitable lamp properly located to enable the engineer to easily see the water in the glass.

#### INJECTORS.

43. Injectors must be kept in good condition, free from scale, and must be tested before each trip. Boiler checks, delivery pipes, feed water pipes, tank hose and tank valves must be kept in good condition, free from leaks and from foreign substances that would obstruct the flow of water.

#### FLUE PLUGS.

44. Flue plugs must be provided with a hole through the center not less than three-fourths inch in diameter. When one or more tubes are plugged at both ends the plugs must be tied together by means of a rod less than five-eighths inch in diameter. Flue plugs must be removed and flues repaired at the first point where such repairs can properly be made.

#### WASHING BOILERS.

45. *Time of washing.*—All boilers shall be thoroughly washed as often as the water conditions require, but not less frequently than once each month. All boilers shall be considered as having been in continuous service between washouts unless the dates of the days that the boiler was out of service are properly certified on washout reports and the report of inspection.

46. *Plugs to be removed.*—When boilers are washed, all washout, arch, and water bar plugs must be removed.

47. *Water tubes.*—Special attention must be given the arch and water bar tubes to see that they are free from scale and sediment.

48. *Office record.*—An accurate record of all locomotive boiler washouts shall be kept in the office of the railroad company. The following information must be entered on the day that the boiler is washed:

- (a) Number of locomotive.
- (b) Date of washout.
- (c) Signature of boiler washer or inspector.
- (d) Statement that spindles of gauge cocks and water-glass cocks were removed and cocks cleaned.
- (e) Signature of the boiler inspector or the employee who removed the spindles and cleaned the cocks.

#### STEAM LEAKS.

49. *Leaks under lagging.*—If a serious leak develops under the lagging, an examination must be made and the leaked located. If the leak is found to be due to a crack in the shell or to any other defect which may reduce safety, the boiler must be taken out of service at once, thoroughly repaired, and reported to be in satisfactory condition before it is returned to service.

50. *Leaks in front of enginemen.*—All steam valves, cocks, and joints, studs, bolts, and seams shall be kept in such repair that they will not emit steam in front of the enginemen, so as to obscure their vision.

#### FILING REPORTS.

51. *Report of inspection.*—Not less than once each month and within 10 days after each inspection a report of inspection, Form No. 1, size 6 by 9 inches, shall be filed with the district inspector of locomotive boilers for each locomotive used by a railroad company, and a copy shall be filed in the office of the chief mechanical officer having charge of the locomotive.

52. A copy of the monthly inspection report, Form No. 1, or annual inspection report, Form No. 3, properly filled out, shall be placed under glass in a conspicuous place in the cab of the locomotive before the boiler inspected is put into service.

53. Not less than once each year and within 10 days after hydrostatic and other required tests have been completed a report of such tests showing general condition of the boiler and repairs made shall be submitted on Form No. 3,<sup>1</sup> size 6 by 9 inches, and filed with the district inspector of locomotive boilers, and a copy shall be filed in the office of the chief mechanical officer having charge of the locomotive. The monthly report will not be required for the month in which this report is filed.

<sup>1</sup> Form No. 3 should be printed on yellow paper.

Note.—Samples of boiler forms 1, 3, and 4 indicating exact size, color, weight, and grade of paper will be furnished on application.

54. (a) *Specification card*.—A specification card, size 8 by 10½ inches, Form No. 4, containing the results of the calculations made in determining the working pressure and other necessary data shall be filed in the office of the chief inspector of locomotive boilers for each locomotive boiler. A copy shall be filed in the office of the chief mechanical officer having charge of the locomotive. Every specification card shall be verified by the oath of the engineer making the calculations, and shall be approved by the chief mechanical officer. These specification cards shall be filed as promptly as thorough examination and accurate calculation will permit. Where accurate drawings of boilers are available, the data for specification card, Form No. 4, may be taken from the drawings, and such specification cards must be completed and forwarded prior to July 1, 1912. Where accurate drawings are not available, the required data must be obtained at the first opportunity when general repairs are made, or when flues are removed. Specification cards must be forwarded within one month after examination has been made, and all examinations must be completed and specification cards filed prior to July 1, 1913, flues being removed if necessary to enable the examination to be made before this date.

(b) When any repairs or changes are made which affect the data shown on the specification card a corrected card or an alteration report on an approved form, size 8 by 10½ inches, properly certified to, giving details of such changes, shall be filed within 30 days from the date of their completion. This report should cover:

A. Application of new barrel or domes.

B. Application of patches to barrels or domes of boilers or to portion of wrapper sheet of crown bar boilers which is not supported by staybolts.

C. Longitudinal seam reinforcements.

D. Changes in size or number of braces, giving maximum stress.

E. Initial application of superheaters, arch or waterbar tubes, giving number and dimensions of tubes.

F. Changes in number or capacity of safety valves.

Report of patches should be accompanied by a drawing or blue print of the patch, showing its location in regard to the center line of boiler, giving all necessary dimensions, and showing the nature and location of the defect. Patches previously applied should be reported the first time the boiler is stripped to permit an examination.

#### ACCIDENT REPORTS.

55. In the case of an accident resulting from failure, from any cause, of a locomotive boiler or any of its appurtenances, resulting in serious injury or death to one or more persons, the carrier owning or operating such locomotive shall immediately transmit by wire to the chief inspector of locomotive boilers, at his office in Washington, D. C., a report of such accident, stating the nature of the accident, the place at which it occurred, as well as where the locomotive may be inspected, which wire shall be immediately confirmed by mail, giving

a full detailed report of such accident, stating, so far as may be known, the causes and giving a complete list of the killed or injured.

## ORDER.

At a General Session of the *Interstate Commerce Commission*, held at its office in Washington, D. C., on the 11th day of October, A. D. 1915.

*In the Matter of Rules and Instructions for the Inspection and Testing of Steam Locomotives and Tenders in Accordance with Act of February 17, 1911, Amended March 4, 1915.*

Whereas the act of March 4, 1915 (Public—No. 318, Sixty-third Congress), amending the act of February 17, 1911, making said act apply to and include the entire locomotive and tender and all their parts, requires, among other things, that each carrier subject to this act shall file its rules and instructions for the inspection of locomotives and tenders with the chief inspector within three months after the approval of the act, and after hearing and approval by the Interstate Commerce Commission such rules and instructions, with such modifications as the Commission requires, shall become obligatory upon such carrier: *Provided, however*, That if any carrier subject to this act shall fail to file its rules and instructions the chief inspector shall prepare rules and instructions not inconsistent therewith for the inspection of locomotives and tenders, to be observed by such carrier, which rules and instructions being approved by the Interstate Commerce Commission and a copy thereof being served on the president, general manager, or general superintendent of such carrier shall be obligatory, and a violation thereof punished as provided in said act; and

Whereas at the expiration of the period of three months after the approval of said act, the carriers having filed a code of rules prepared by their committee as a basis for discussion only, and having expressed a desire through their committee that the chief inspector prepare a suitable code of rules for the inspection of locomotives and tenders; and

Whereas the chief inspector thereupon, in accordance with the law and with the expressed desire of the carriers, proceeded to prepare for submission to the Interstate Commerce Commission for approval rules and instructions for the inspection of locomotives and tenders and all their parts; and

Whereas upon due notice there came on a hearing before the Interstate Commerce Commission on September 28 to October 2, 1915, inclusive, in the matter of approval and establishment of the rules and instructions prepared by the said chief inspector; and

Whereas at the hearing aforesaid the rules and instructions prepared by the chief inspector were submitted to the Commission for approval, and all parties appearing at said hearing were fully heard in respect to the matters involved; and

Whereas all of the rules prepared by the chief inspector having been agreed to by representatives of the railroad employees, and all

except rules numbered 18, 29, and 31 having been agreed to by representatives of the carriers; and

Whereas it appearing that the interests of all may be best served by the immediate promulgation of the rules which have been agreed to, thus avoiding the delay incident to the consideration of evidence and briefs with respect to the said rules numbered 18, 29, and 31, which will be acted on later, the said rules and instructions having been fully considered by the Commission:

*It is ordered*, That the said rules and instructions for the inspection of locomotives and tenders and all their parts, as follows, be, and the same are hereby, approved, and from and after the 1st day of January, 1916, shall be observed by each and every common carrier subject to the provisions of the act of Congress aforesaid as the minimum requirements: *Provided*, That nothing herein contained shall be construed as prohibiting any carrier from enforcing additional rules and instructions not inconsistent with the foregoing, tending to a greater degree of precaution against accidents.

*It is further ordered*, That changes required by paragraph 2 of rule 16, the first sentence of rule 17, paragraph 2 of rule 22, paragraph 2 of rule 43, the first sentence of rule 47, paragraph 1 of rule 50, rule 51, and paragraph 3 of rule 52 shall be made the first time locomotives are shopped for general or heavy repairs, but must be completed before January 1, 1917.

By the Commission.

[SEAL.]

GEORGE B. MCGINTY,  
*Secretary.*

ORDER.

At a General Session of the *Interstate Commerce Commission*, held at its office in Washington, D. C., on the 26th day of December, A. D. 1916.

*In the matter of rules and instructions for the inspection and testing of steam locomotives and tenders in accordance with act of February 17, 1911, amended March 4, 1915.*

*It appearing*, That the act of March 4, 1915 (Public—No. 318, sixty-third Congress), amending the act of February 17, 1911, making said act apply to and include the entire locomotive and tender and all their parts, requires, among other things, that each carrier subject to said act shall file its rules and instructions for the inspection of locomotives and tenders and appurtenances thereof with the chief inspector within three months after the approval of the act and after hearing and approval by the Interstate Commerce Commission, such rules and instructions, with such modifications as the Commission requires, shall become obligatory upon such carrier: *Provided, however*, That if any carrier subject to said act shall fail to file its rules and instructions, the chief inspector shall prepare rules and instructions not inconsistent therewith for the inspection of locomotives and tenders, to be observed by such carrier; which rules and instructions being approved by the Interstate Commerce Commission and a copy thereof

being served on the president, general manager, or general superintendent of such carrier, shall be obligatory, and a violation thereof punished as provided in said act.

*It further appearing*, That a full investigation has been had and that there has been a full hearing and consideration by the Commission of evidence, briefs, and arguments with respect to the rules numbered 29 and 31 of the rules and instructions for inspection and testing of steam locomotives and tenders, as submitted by the chief inspector and referred to in the order of the Commission dated October 11, 1915;

*It is ordered*, That said rules numbered 29 and 31 of the order of the Commission dated October 11, 1915, providing rules and instructions for inspection and testing of steam locomotives and tenders to be observed by each and every common carrier subject to the act of Congress aforesaid as the minimum requirements, shall be as follows:

#### LIGHTS.

29. *Locomotives used in road service.*—Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive enginemen, to see in a clear atmosphere, a dark object as large as a man of average size standing erect at a distance of at least 800 feet ahead and in front of such headlight; and such headlight must be maintained in good condition.

Each locomotive used in road service, which is regularly required to run backward for any portion of its trip, except to pick up a detached portion of its train, or in making terminal movements, shall have on its rear headlight which shall meet the foregoing requirements.

Such headlights shall be provided with a device whereby the light from same may be diminished in yards and at stations or when meeting trains.

When two or more locomotives are used in the same train, the leading locomotive only will be required to display a headlight.

31. *Locomotives used in yard service.*—Each locomotive used in yard service between sunset and sunrise shall have two lights, one located on the front of the locomotive and one on the rear, each of which shall enable a person in the cab of the locomotive under the conditions, including visual capacity, set forth in rule 29, to see a dark object such as there described for a distance of at least 300 feet ahead and in front of such headlight; and such headlights must be maintained in good condition.

*It is further ordered.* That the said rules numbered 29 and 31 shall apply to all locomotives constructed after July 1, 1917, and for locomotives constructed prior to that date the changes required by the above rules shall be made the first time locomotives are shopped for general or heavy repairs after July 1, 1917, and all locomotives must be so equipped before July 1, 1920.

By the Commission:

[SEAL.]

GEORGE B. MCGINTY,  
*Secretary.*

## ORDER.

At a General Session of the *Interstate Commerce Commission*, held at its office in Washington, D. C., on the 1st day of September, A. D. 1916.

*In the matter of rules and instructions for the inspection and testing of steam locomotives and tenders in accordance with act of February 17, 1911, amended March 4, 1915.*

On further consideration of the above entitled matter,

*It is ordered*, That the last paragraph of the order of June 6, 1916, entered herein be, and the same is hereby, amended so as to read as follows: "It is further ordered that said rules 29 and 31 be, and they are hereby, made applicable to all new steam locomotives put in service subsequent to January 1, 1917, and to all steam locomotives given general overhauling subsequent to January 1, 1917, and that all steam locomotives subject to the rules be equipped in conformity therewith not later than January 1, 1920."

By the Commission:

[SEAL.]

GEORGE B. MCGINTY,  
*Secretary.*

## ORDER.

At a General Session of the *Interstate Commerce Commission*, held at its office in Washington, D. C., on the 30th day of June, A. D. 1916.

*In the matter of rules and instructions for the inspection and testing of steam locomotives and tenders in accordance with act of February 17, 1911, amended March 4, 1915.*

To avoid confusion on account of duplication of numbers of the locomotive boiler inspection rules, and for more convenient reference,

*It is ordered*, That the rules and instructions, numbered from 1 to 62, inclusive, for the inspection and testing of steam locomotives and tenders, as prescribed by the Commission's orders of October 11, 1915, and June 6, 1916, shall be numbered from 101 to 162, inclusive.

By the Commission:

[SEAL.]

GEORGE B. MCGINTY,  
*Secretary.*

**RULES AND INSTRUCTIONS FOR INSPECTION AND TESTING OF  
STEAM LOCOMOTIVES AND TENDERS.**

**IN ACCORDANCE WITH THE ACT OF MARCH 4, 1915, AMENDING  
THE ACT OF FEBRUARY 17, 1911.**

Approved by orders of the Interstate Commerce Commission, dated October 11, 1915, June 6, 1916, and June 30, 1916.

101. The railroad company will be held responsible for the general design, construction, and maintenance of locomotives and tenders under its control.

102. The mechanical officer in charge, at each point where repairs are made, will be held responsible for the inspection and repair of all parts of locomotives and tenders under his jurisdiction. He



must know that inspections are made as required and that the defects are properly repaired before the locomotive is returned to service..

103. The term "inspector" as used in these rules and instructions means, unless otherwise specified, the railroad company's inspector.

104. Each locomotive and tender shall be inspected after each trip, or day's work, and the defects found reported on an approved form to the proper representative of the company. This form shall show the name of the railroad, the initials and number of the locomotive, the place, date, and time of the inspection, the defects found, and the signature of the employee making the inspection. The report shall be approved by the foreman, with proper written explanation made thereon for defects reported which were not repaired before the locomotive is returned to service. The report shall then be filed in the office of the railroad company at the place where the inspection is made.

#### ASH PANS

105. (a) Ash pans shall be securely supported and maintained in safe and suitable condition for service.

(b) Locomotives built after January 1, 1916, shall have ash pans supported from mud rings or frames. Locomotives built prior to January 1, 1916, which do not have the ash pans supported from mud rings on frames shall be changed when the locomotive receives new firebox.

(c) The operating mechanism of all ash pans shall be so arranged that it may be safely operated, and maintained in safe and suitable condition for service.

(d) No part of ash pan shall be less than  $2\frac{1}{2}$  inches above the rail.

#### BRAKE AND SIGNAL EQUIPMENT.

106. It must be known before each trip that the brakes on locomotive and tender are in safe and suitable condition for service; that the air compressor or compressors are in condition to provide an ample supply of air for the service in which the locomotive is put; that the devices for regulating all pressures are properly performing their functions; that the brake valves work properly in all positions; and that the water has been drained from the air brake system.

107. (a) *Compressors.*—The compressor or compressors shall be tested for capacity by orifice test as often as conditions may require, but not less frequently than once each three months.

(b) The diameter of orifice, speed of compressor, and the air pressure to be maintained for compressors in common use are given in the following table:

Make.	Size compressor.	Single strokes per minute.	Diameter of orifice.	Air pressure maintained.
			<i>Inches.</i>	<i>Pounds.</i>
Westinghouse .....	9½ .....	120	$\frac{11}{16}$	60
Do. ....	11 .....	100	$\frac{3}{8}$	60
Do. ....	8½ c. c. ....	100	$\frac{1}{8}$	60
New York .....	2a .....	120	$\frac{3}{8}$	60
Do. ....	6a .....	100	$\frac{1}{8}$	60
Do. ....	5b .....	100	$\frac{1}{8}$	60

For diagram of orifice see figure No. 14.

This table shall be used for altitudes to and including 1,000 feet. For altitudes over 1,000 feet the speed of compressor may be increased 5 single strokes per minute for each 1,000 feet increase in altitude.

108. (a) *Testing main reservoirs.*—Every main reservoir before being put into service, and at least once each 12 months thereafter, shall be subjected to hydrostatic pressure not less than 25 per cent above the maximum allowed air pressure.

(b) The entire surface of the reservoir shall be hammer tested each time the locomotive is shopped for general repairs, but not less frequently than once each 18 months.

109. (a) *Air gauges.*—Air gauges shall be so located that they may be conveniently read by the engineer from his usual position in the cab. Air gauges shall be tested at least once each three months, and also when any irregularity is reported.

(b) Air gauges shall be compared with an accurate test gauge or dead weight tester, and gauges found incorrect shall be repaired before they are returned to service.

110. *Time of cleaning.*—Distributing or control valves, reducing valves, triple valves, straight-air double-check valves, dirt collectors, and brake cylinders shall be cleaned and brake cylinders lubricated as often as conditions require to maintain them in a safe and suitable condition for service, but not less frequently than once each six months.

111. (a) *Stenciling dates of tests and cleaning.*—The date of testing or cleaning, and the initials of the shop or station at which the work is done, shall be legibly stenciled in a conspicuous place on the parts, or placed on a card displayed under glass in the cab of the locomotive, or stamped on metal tags. When metal tags are used, the height of letters and figures shall be not less than three-eighths inch, and the tags located as follows:

(b) One securely attached to brake pipe near automatic brake valve, which will show the date on which the distributing valve, control valve or triple valves, reducing valves, straight-air double-check valves, dirt collectors, and brake cylinders were cleaned and cylinders lubricated.

(c) One securely attached to air compressor steam pipe, which will show the date on which the compressor was tested by orifice test.

(d) One securely attached to the return pipe near main reservoir which will show the date on which the hydrostatic test was applied to main reservoirs.

112. (a) *Piston travel*.—The minimum piston travel shall be sufficient to provide proper brake shoe clearance when the brakes are released.

(b) The maximum piston travel when locomotive is standing shall be as follows:

	Inches.
Cam type of driving wheel brake .....	3½
Other forms of driving wheel brake .....	6
Engine truck brake .....	8
Tender brake .....	9

113. (a) *Foundation brake gear*.—Foundation brake gear shall be maintained in a safe and suitable condition for service. Levers, rods, brake beams, hangers, and pins shall be of ample strength, and shall not be fouled in any way which will affect the proper operation of the brake. All pins shall be properly secured in place with cotters, split keys, or nuts. Brake shoes must be properly applied and kept approximately in line with the tread of the wheel.

(b) No part of the foundation brake gear of the locomotive or tender shall be less than 2½ inches above rails.

114 (a) *Leakage*.—Main reservoir leakage; leakage from main reservoir and related piping shall not exceed an average of 3 pounds per minute in a test of three minutes' duration, made after the pressure has been reduced 40 per cent below maximum pressure.

(b) Brake pipe leakage shall not exceed 5 pounds per minute.

(c) *Brake cylinder leakage*.—With a full service application from maximum brake pipe pressure, and with communication to the brake cylinders closed, the brakes on the locomotive and tender shall remain applied not less than five minutes.

115. *Train signal system*.—The train signal system, when used, shall be tested and known to be in safe and suitable condition for service before each trip.

#### CABS, WARNING SIGNALS, AND SANDERS.

116 (a). *Cabs*.—Cabs shall be securely attached or braced and maintained in a safe and suitable condition for service. Cab windows shall be so located and maintained that the enginemen may have a clear view of track and signals from their usual and proper positions in the cab.

(b) Road locomotives used in regions where snowstorms are generally encountered shall be provided with what is known as a "clear vision" window, which is a window hinged at the top and placed in the glass in each front cab door or window. These windows shall be not less than 5 inches high, located as nearly as possible in line of the enginemen's vision, and so constructed that they may be easily opened or closed.

(c) Steam pipes shall not be fastened to the cab. On new construction or when renewals are made of iron or steel pipe subject to boiler pressure in cabs, it shall be what is commercially known as double strength pipe, with extra heavy valves and fittings.

117. *Cab aprons*.—Cab aprons shall be of proper length and width to insure safety. Aprons must be securely hinged, maintained in a safe and suitable condition for service, and roughened, or other provision made, to afford secure footing.

119. *Cylinder cocks*.—Necessary cylinder cocks, operative from cab of locomotive, shall be provided and maintained in a safe and suitable condition for service.

120. *Sanders*.—Locomotives shall be equipped with proper sanding apparatus, which shall be maintained in safe and suitable condition for service, and tested before each trip. Sand pipes must be securely fastened in line with the rails.

121. *Whistle*.—Each locomotive must be provided with a suitable steam whistle, so arranged that it may be conveniently operated by the engineer.

#### DRAW GEAR AND DRAFT GEAR.

122 (a). *Draw gear between locomotive and tender*.—The draw gear between the locomotive and tender, together with the pins and fastenings, shall be maintained in safe and suitable condition for service. The pins and drawbar shall be removed and carefully examined for defects not less frequently than once each three months. Suitable means for securing the drawbar pins in place shall be provided. Inverted drawbar pins shall be held in place by plate or stirrup.

(b) Two or more safety bars or safety chains of ample strength shall be provided between locomotive and tender, maintained in safe and suitable condition for service, and inspected at the same time draw gear is inspected.

(c) Safety chains or safety bars shall be of the minimum length consistent with the curvature of the railroad on which the locomotive is operated.

(d) Lost motion between locomotives and tenders not equipped with spring buffers shall be kept to a minimum, and shall not exceed one-half inch.

(e) When spring buffers are used between locomotive and tender the spring shall be applied with not less than three-fourths inch compression, and shall at all times be under sufficient compression to keep the chafing faces in contact.

123. *Chafing irons*.—Chafing irons of such radius as will permit proper curving shall be securely attached to locomotive and tender, and shall be maintained in condition to permit free movement laterally and vertically.

124. *Draft gear*.—Draft gear and attachments on locomotives and tenders shall be securely fastened, and maintained in safe and suitable condition for service.

## DRIVING GEAR.

125. *Crossheads*.—Crossheads shall be maintained in a safe and suitable condition for service, with not more than one-fourth inch vertical or fixe-sixteenths inch lateral play between crossheads and guides.

126. *Guides*.—Guides must be securely fastened and maintained in a safe and suitable condition for service.

127 (a) *Pistons and piston rods*.—Pistons and piston rods shall be maintained in safe and suitable condition for service. Piston rods shall be carefully examined for cracks each time they are removed, and shall be renewed if found defective.

(b) All piston rods applied after January 1, 1916, shall have the date of application, original diameter, and kind of material legibly stamped on or near the end of rod.

128 (a) *Rods, main and side*.—Cracked or defective main or side rods shall not be continued in service.

(b) Autogenous welding of broken or cracked main and side rods not permitted.

(c) Bearings and bushings shall so fit the rods as to be in a safe and suitable condition for service, and means be provided to prevent bushings turning in rod. Straps shall fit and be securely bolted to rods.

(d) The total amount of side motion of rods on crank pins shall not exceed one-fourth inch.

(e) *Locomotives used in road service*.—The bore of main rod bearings shall not exceed pin diameters more than three thirty-seconds inch at front or back end. The total lost motion at both ends shall not exceed five thirty-seconds inch.

(f) The bore of side rod bearings shall not exceed pin diameters more than five thirty-seconds inch on main pin, nor more than three-sixteenths inch on other pins.

(g) *Locomotives used in yard service*.—The bore of main rod bearings shall not exceed pin diameters more than one-eighth inch at front end or five thirty-seconds inch at back end.

(h) The bore of side rod bearings shall not exceed pin diameter more than three-sixteenths inch.

(i) Oil and grease cups shall be securely attached to rods, and grease cup plugs shall be equipped with suitable fastenings.

## LIGHTS.

129. (a) *Locomotives used in road service*.—Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive enginemen, to see in a clear atmosphere, a dark object as large as a man of average size standing erect at a distance of at least 800 feet ahead and in front of such headlight; and such headlight must be maintained in good condition.

(b) Each locomotive used in road service, which is regularly required to run backward for any portion of its trip, except to pick up a detached portion of its train, or in making terminal movements, shall have on its rear a headlight which shall meet the foregoing requirements.

(c) Such headlights shall be provided with a device whereby the light from same may be diminished in yards and at stations or when meeting trains.

(d) When two or more locomotives are used in the same train, the leading locomotive only will be required to display a headlight.

130. *Classification lamps.*—Each locomotive used in road service shall be provided with such classification lamps as may be required by the rules of the railroad company operating the locomotive. When such classification lamps are provided they shall be kept clean and maintained in safe and suitable condition for service.

131. *Locomotives used in yard service.*—Each locomotive used in yard service between sunset and sunrise shall have two lights, one located on the front of the locomotive and one on the rear, each of which shall enable a person in the cab of the locomotive under the conditions, including visual capacity, set forth in rule 129, to see a dark object such as there described for a distance of at least 300 feet ahead and in front of such headlight; and such headlights must be maintained in good condition.

132. *Cab lights.*—Each locomotive used between sunset and sunrise shall have cab lamps which will provide sufficient illumination for the steam, air, and water gauges to enable the enginemen to make necessary and accurate readings from their usual and proper positions in the cab. These lights shall be so located and constructed that the light will shine only on those parts requiring illumination. Locomotives used in road service shall have an additional lamp conveniently located to enable the persons operating the locomotive to easily and accurately read train orders and time tables and so constructed that it may be readily darkened or extinguished.

#### RUNNING GEAR.

133 (a). *Driving, trailing, and engine truck axles.*—Driving, trailing, and engine truck axles with any of the following defects shall not be continued in service:

(b) Bent axle; cut journals that can not be made to run cool without turning; seamy journals in steel axles; transverse seams in iron axles, or any seams in iron axles causing journals to run hot, or unsafe on account of usage, accident, or derailment; driving, trailing, or engine truck axles more than one-half inch under original diameter, except for locomotives having all driving axles of the same diameter, when other than main driving axles, may be worn three-fourths inch below the original diameter.

(c) The date applied, the original diameter of the journal, and the kind of material shall be legibly stamped on one end of each driving axle, trailing truck axle, and engine truck axle applied after January 1, 1916.

134. *Tender truck axles.*—The minimum diameters of axles for various axle loads shall be as follows:

Axle load	Minimum diameter of journal.	Minimum diameter of wheel seat.	Minimum diameter of center.
	<i>Inches</i>	<i>Inches.</i>	<i>Inches.</i>
50,000 pounds.....	5½	7⅝	6⅞
38,000 pounds.....	5	6¾	5⅝
31,000 pounds.....	4½	6¼	5⅝
22,000 pounds.....	3¾	5	4⅝
15,000 pounds.....	3¼	4⅝	3⅝

135. (a) Tender truck axles with any of the following defects shall not be continued in service:

(b) Bent axle; cut journals that can not be made to run cool without turning; seamy journals in steel axles, or transverse seams in journals of iron axles, or unsafe on account of usage, accident, or derailment; collars broken or worn to one-fourth inch or less in thickness; fillet in back shoulder worn out.

136. (a). *Crank pins.*—Crank pins shall be securely applied. Shimming or prick punching crank pins will not be allowed. All crank pins applied after January 1, 1916, shall have the date applied and kind of material used legibly stamped on end of pin.

(b) Crank pin collars and collar bolts shall be maintained in a safe and suitable condition for service.

137. *Driving boxes.*—Driving boxes shall be maintained in a safe and suitable condition for service. Broken and loose bearings shall be renewed. Not more than one shim may be used between box and bearing.

138. *Driving box shoes and wedges.*—Driving box shoes and wedges shall be maintained in a safe and suitable condition for service.

139. *Frames.*—Frames, deck plates, tailpieces, pedestals, and braces shall be maintained in a safe and suitable condition for service, and shall be cleaned and thoroughly inspected each time the locomotive is in shop for heavy repairs.

140. (a). *Lateral motion.*—The total lateral motion or play between the hubs of the wheels and the boxes on any pair of wheels shall not exceed the following limits:

	<i>Inches</i>
For engine truck wheels (trucks with swing centers).....	1
For engine truck wheels (trucks with rigid centers).....	1½
For trailing truck wheels .....	1
For driving wheels (more than one pair).....	¾

(b) These limits may be increased on locomotives operating on track where the curvature exceeds 20 degrees when it can be shown that conditions require additional lateral motion.

(c) The lateral motion shall in all cases be kept within such limits that the driving wheels, rods, or crank pins will not interfere with other parts of the locomotive.

141 (a). *Pilots*.—Pilots shall be securely attached, properly braced, and maintained in a safe and suitable condition for service.

(b) The minimum clearance of pilot above the rail shall be 3 inches, and the maximum clearance 6 inches.

142 (a). *Spring rigging*.—Springs and equalizers shall be arranged to insure the proper distribution of weight to the various wheels of the locomotive, maintained approximately level, and in a safe and suitable condition for service.

(b) Springs or spring rigging with any of the following defects shall be renewed or properly repaired:

(c) One long leaf or two or more shorter leaves broken.

(d) Springs with leaves working in band.

(e) Broken coil springs.

(f) Broken driving box saddle, equalizer, hanger, bolt, or pin.

143. (a). *Trucks, leading and trailing*.—Trucks shall be maintained in safe and suitable condition for service. Center plates shall fit properly, and the male center plate shall extend into the female center plate not less than three-fourths inch. All centering devices shall be properly maintained.

(b) A suitable safety chain shall be provided at each front corner of all four wheel engine trucks.

(c) All parts of trucks shall have sufficient clearance to prevent them from seriously interfering with any other part of the locomotive.

144 (a). *Wheels*.—Wheels shall be securely pressed on axles. Prick punching or shimming the wheel fit will not be permitted. The diameter of wheels on the same axle shall not vary more than three thirty-seconds inch.

(b) Wheels used on standard gauge track will be out of gauge if the inside gauge of flanges, measured on base line, is less than 53 inches or more than  $53\frac{3}{8}$  inches.

(c) The distance back to back of flanges of wheels mounted on the same axle shall not vary more than one-fourth inch, with any of the following defects shall not be continued inservice:

145 (a). *Cast iron or cast steel wheels*.—Cast iron or cast steel wheels with any of the following defects shall not be continued in service:

(b) *Slid flat*.—When the flat spot is  $2\frac{1}{2}$  inches or over in length, or if there are two or more adjoining spots each 2 inches or over in length.

(c) *Broken or chipped flange*.—If the chip exceeds  $1\frac{1}{2}$  inches in length and one-half inches in width.

(d) *Broken rim*.—If the tread, measures from the flange at a point five-eighths inch above the tread, is less than  $3\frac{3}{4}$  inches in width.

(e) *Shelled out*.—Wheels with defective treads on account of cracks or shelled out spots  $2\frac{1}{2}$  inches or over, or so numerous as to endanger the safety of the wheel.



(f) *Brake burn*.—Wheels having defective tread on account of cracks or shelling out due to heating.

(g) *Seams* one-half inch long or over, at a distance of one-half inch or less from the throat of the flange, or seams 3 inches or more in length, if such seams are within the limits of  $3\frac{3}{4}$  inches from the flange, measured at a point five-eighths inch from the tread.

(h) *Worn flange*.—Wheels on axles with journals 5 inches by 9 inches or over with flanges having flat vertical surfaces extending seven-eighths inch or more from the tread, or flanges 1 inch thick or less gauged at a point three-eighths inch above tread. Wheels on axles with journals less than 5 inches by 9 inches with flanges having flat vertical surfaces extending 1 inch or more from the tread, or flanges fifteen-sixteenths inch thick or less, gauged at a point three-eighths inch above the tread.

(i) *Tread worn hollow*.—If the tread is worn sufficiently hollow to render the flange or rim liable to breakage.

(j) *Burst*.—If the wheel is cracked from the wheel fit outward.

(k) *Cracked tread, cracked plate, or one or more cracked brackets*.

(l) *Wheels out of gauge*.

(m) *Wheels loose on axle*.

**NOTE**.—The determination of flat spots, worn flanges, and broken rims shall be made by a gauge as shown in figure 8, and its application to defective wheels as shown in figures 9, 10, 11, 12, and 13.

146. (a) *Forged steel or steel tired wheels*.—Forged steel or steel tired wheels with any of the following defects shall not be continued in service:

(b) *Loose wheels; loose, broken, or defective retaining rings or tires; broken or cracked hubs, plates, spokes, or bolts*.

(c) *Slid flat spot*  $2\frac{1}{2}$  inches or longer; or, if there are two or more adjoining spots, each 2 inches or longer.

(d) *Defective tread on account of cracks or shelled out spots*  $2\frac{1}{2}$  inches or longer, or so numerous as to endanger the safety of the wheel.

(e) *Broken flange*.

(f) *Flange worn to fifteen-sixteenths inch or less in thickness gauged at a point three-eighths inch above the tread, or having flat vertical surface 1 inch or more from tread; tread worn five-sixteenths inch; flange more than  $1\frac{1}{2}$  inches from tread to top of flange, or thickness of tires or rims less than shown in figures 4, 5, 6, and 7*.

(g) *Wheels out of gauge*.

147. *Driving and trailing wheels*.—Driving and trailing wheel centers with divided rims shall be properly fitted with iron or steel filling blocks before the tires are applied, and such filling blocks shall be properly maintained. When shims are inserted between the tire and the wheel center, not more than two thicknesses of shims may be used, one of which must extend entirely around the wheel.

148. *Driving wheels counterbalance shall be maintained in a safe and suitable condition for service*.

149 (a). *Driving and trailing wheels with any of the following defects shall not be continued in service:*

(b) Driving or trailing wheel centers with three adjacent spokes or 25 per cent of the spokes in wheel broken.

(c) Loose wheels; loose, broken, or defective tires or tire fastenings; broken or cracked hubs, or wheels out of gauge.

150 (a). *Driving and trailing wheel tires.*—The minimum height of flange for driving and trailing wheel tires, measured from tread, shall be 1 inch for locomotives used in road service, except for locomotives originally constructed for plain tires, when the minimum height of flange on one pair of wheels may be seven-eighths inch.

(b) The minimum height of flange for driving wheel tires, measured from tread, shall be seven-eighths inch for locomotives used in switching service.

(c) The maximum taper for tread of tires from throat of flange to outside of tire, for driving and trailing wheels for locomotives used in road service, shall be one-fourth inch, and for locomotives used in switching service five-sixteenths inch.

(d) The minimum width of tires for driving and trailing wheels of standard-gauge locomotives shall be  $5\frac{1}{2}$  inches for flanged tires, and 6 inches for plain tires.

(e) The minimum width of tires for driving and trailing wheels of narrow-gauge locomotives shall be 5 inches for flanged tires, and  $5\frac{1}{2}$  inches for plain tires.

(f) When all tires are turned or new tires applied to driving and trailing wheels, the diameter of the wheels on the same axle, or in the same driving wheel base, shall not vary more than three thirty seconds inch. When a single tire is applied the diameter must not vary more than three thirty-seconds inch from that of the opposite wheel on the same axle. When a single pair of tires is applied the diameter must be within three thirty-seconds inch of the average diameter of the wheels in the driving-wheel base to which they are applied.

(g) Driving and trailing wheel tires with any of the following defects shall not be continued in service:

(h) Slid flat spot  $2\frac{1}{2}$  inches or more in length; flange fifteen-sixteenths inch or less in thickness, gauged at a point three-eighths inch above the tread, or having flat vertical surface 1 inch or more from tread; tread worn hollow five-sixteenths inch on locomotives used in road service, or three-eighths inch on locomotives used in switching service; flange more than  $1\frac{1}{2}$  inches from tread to top of flange. (See figs. 1, 2, and 3.)

NOTE.—The determination of flat spots and worn flanges shall be made by a gauge as shown in figure 8, and its application to defective tires as shown in figures 9, 10, and 11.

151 (a). *Minimum thickness for driving wheel and trailer tires on standard and narrow gauge locomotives:*

Weight per axle (weight on drivers divided by number of pairs of driving wheels).	Diameter of wheel center.	Minimum thickness, service limits.	
		Road service.	Switching service.
	<i>Inches.</i>	<i>Inches.</i>	<i>Inches.</i>
30,000 pounds and under.....	44 and under.....	$1\frac{1}{2}$	$1\frac{1}{8}$
	Over 44 to 50.....	$1\frac{5}{16}$	$1\frac{3}{16}$
	Over 50 to 56.....	$1\frac{7}{16}$	$1\frac{1}{2}$
	Over 56 to 62.....	$1\frac{7}{16}$	$1\frac{5}{16}$
	Over 62 to 68.....	$1\frac{1}{2}$	.....
	Over 68 to 74.....	$1\frac{9}{16}$	.....
	Over 74.....	$1\frac{5}{8}$	.....
Over 30,000 to 35,000 pounds..	44 and under.....	$1\frac{7}{16}$	$1\frac{3}{8}$
	Over 44 to 50.....	$1\frac{7}{16}$	$1\frac{1}{2}$
	Over 50 to 56.....	$1\frac{7}{16}$	$1\frac{5}{16}$
	Over 56 to 62.....	$1\frac{1}{2}$	$1\frac{7}{16}$
	Over 62 to 68.....	$1\frac{9}{16}$	.....
	Over 68 to 74.....	$1\frac{5}{8}$	.....
	Over 74.....	$1\frac{7}{16}$	.....
Over 35,000 to 40,000 pounds..	44 and under.....	$1\frac{3}{4}$	$1\frac{1}{2}$
	Over 44 to 50.....	$1\frac{7}{16}$	$1\frac{5}{16}$
	Over 50 to 56.....	$1\frac{1}{2}$	$1\frac{7}{16}$
	Over 56 to 62.....	$1\frac{9}{16}$	$1\frac{7}{16}$
	Over 62 to 68.....	$1\frac{5}{8}$	.....
	Over 68 to 74.....	$1\frac{11}{16}$	.....
	Over 74.....	$1\frac{3}{4}$	.....
Over 40,000 to 45,000 pounds..	44 and under.....	$1\frac{7}{16}$	$1\frac{5}{16}$
	Over 44 to 50.....	$1\frac{1}{2}$	$1\frac{3}{8}$
	Over 50 to 56.....	$1\frac{9}{16}$	$1\frac{7}{16}$
	Over 56 to 62.....	$1\frac{5}{8}$	$1\frac{1}{2}$
	Over 62 to 68.....	$1\frac{11}{16}$	.....
	Over 68 to 74.....	$1\frac{3}{4}$	.....
	Over 74.....	$1\frac{7}{8}$	.....
Over 45,000 to 50,000 pounds..	44 and under.....	$1\frac{1}{2}$	$1\frac{3}{8}$
	Over 44 to 50.....	$1\frac{9}{16}$	$1\frac{7}{16}$
	Over 50 to 56.....	$1\frac{5}{8}$	$1\frac{1}{2}$
	Over 56 to 62.....	$1\frac{11}{16}$	$1\frac{9}{16}$
	Over 62 to 68.....	$1\frac{3}{4}$	.....
	Over 68 to 74.....	$1\frac{7}{8}$	.....
	Over 74.....	$1\frac{1}{4}$	.....
Over 50,000 to 55,000 pounds..	44 and under.....	$1\frac{9}{16}$	$1\frac{7}{16}$
	Over 44 to 50.....	$1\frac{5}{8}$	$1\frac{1}{2}$
	Over 50 to 56.....	$1\frac{11}{16}$	$1\frac{9}{16}$
	Over 56 to 62.....	$1\frac{3}{4}$	$1\frac{5}{8}$
	Over 62 to 68.....	$1\frac{13}{16}$	.....
	Over 68 to 74.....	$1\frac{7}{8}$	.....
	Over 74.....	$1\frac{15}{16}$	.....
Over 55,000 pounds.....	44 and under.....	$1\frac{5}{8}$	$1\frac{1}{2}$
	Over 44 to 50.....	$1\frac{11}{16}$	$1\frac{9}{16}$
	Over 50 to 56.....	$1\frac{3}{4}$	$1\frac{5}{8}$
	Over 56 to 62.....	$1\frac{13}{16}$	$1\frac{11}{16}$
	Over 62 to 68.....	$1\frac{7}{8}$	.....
	Over 68 to 74.....	$1\frac{15}{16}$	.....
	Over 74.....	2	.....

(b) When retaining rings are used, measurements of tires to be taken from the outside circumference of the ring, and the minimum thickness of tires may be as much below the limits specified above as the tires extend between the retaining rings, provided it does not reduce the thickness of the tire to less than  $1\frac{1}{8}$  inches from the throat of flange to the counterbore for the retaining ring.

(c) The minimum thickness for driving wheel tires shall be 1 inch for locomotives operated on track of 2-foot gauge.

#### TENDERS.

152. (a). *Tender frames*.—Tender frames shall be maintained in a safe and suitable condition for service.

(b) The difference in height between the deck on the tender and the cab floor or deck on the locomotive shall not exceed  $1\frac{1}{2}$  inches.

(c) The minimum width of the gangway between locomotive and tender, while standing on straight track, shall be 16 inches.

153. (a) *Feed water tanks*.—Tanks shall be maintained free from leaks, and in safe and suitable condition for service. Suitable screens must be provided for tank wells or tank hose.

(b) Not less frequently than once each month the interior of the tank shall be inspected, and cleaned if necessary.

(c) Top of tender behind fuel space shall be kept clean, and means provided to carry off waste water. Suitable covers shall be provided for filling holes.

154. *Oil tanks*.—The oil tanks on oil burning locomotives shall be maintained free from leaks. An automatic safety cut out valve, which may be operated by hand from inside and outside of cab, shall be provided for the oil supply pipe.

155. (a) *Tender trucks*.—Tender truck center plates shall be securely fastened, maintained in a safe and suitable condition for service, and provided with a center pin properly secured. When shims are used between truck center plates, the male center plate must extend into the female center plate not less than three-fourths inch.

(b) Truck bolsters shall be maintained approximately level.

(c) When tender trucks are equipped with safety chains, they shall be maintained in a safe and suitable condition for service.

(d) Side bearings shall be maintained in safe and suitable condition for service.

(e) Friction side bearings shall not be run in contact.

(f) The maximum clearance of side bearings on rear truck shall be three-eighths inch, and if used on front truck three-fourths inch, when the spread of side bearings is 50 inches. When the spread of the side bearings is increased, the maximum clearance may be increased in proportion.

#### THROTTLE AND REVERSING GEAR.

156. *Throttles*.—Throttles shall be maintained in safe and suitable condition for service, and efficient means provided to hold the throttle lever in any desired position.

157. *Reversing gear.*—Reversing gear, reverse levers, and quadrants shall be maintained in a safe and suitable condition for service. Reverse lever latch shall be so arranged that it can be easily disengaged, and provided with a spring which will keep it firmly seated in quadrant. Proper counterbalance shall be provided for the valve gear.

158. Upon application to the Chief Inspector, modification of these rules, not inconsistent with their purpose, may be made for roads operating less than five locomotives, if an investigation shows that conditions warrant it.

#### FILING REPORTS.

159. *Report of inspection.*—Not less than once each month and within 10 days after inspection a report of inspection, Form No. 1, size 6 by 9 inches, shall be filed with the United States Inspector in charge for each locomotive used by a railroad company, and a copy shall be filed in the office of the chief mechanical officer having charge of the locomotive.

160. A copy of the monthly inspection report, Form No. 1, or annual inspection report, Form No. 3, properly filled out, shall be placed under glass in a conspicuous place in the cab before the locomotive inspected is put into service.

161. Not less than once each year, and within 10 days after required tests have been completed, a report of such tests, showing general condition of the locomotive, shall be submitted on Form No. 3, size 6 by 9 inches, and filed with the United States Inspector in Charge, and a copy shall be filed in the office of the chief mechanical officer having charge of the locomotive. The monthly report will not be required for the month in which this report is filed.

Form No. 3 should be printed on yellow paper.

NOTE.—Samples of Forms Nos. 1 and 3, indicating exact size, color, weight, and grade of paper, will be furnished on application.

#### ACCIDENT REPORTS.

162. In the case of an accident resulting from failure, from any cause, of a locomotive or tender, or any appurtenances thereof, resulting in serious injury or death to one or more persons, the carrier owning or operating such locomotive shall immediately transmit by wire to the Chief Inspector, at his office in Washington, D. C., a report of such accident, stating the nature of the accident, the place at which it occurred, as well as where the locomotive may be inspected, which wire shall be immediately confirmed by mail, giving a full detailed report of such accident, stating, so far as may be known, the causes and giving a complete list of the killed or injured.

NOTE.—Locomotive boilers and their appurtenances will be inspected in accordance with the order of the Commission, dated June 2, 1911.

Safety appliances on locomotives will be inspected in accordance with the order of the Commission, dated March 13, 1911, extract from which appears on page 77.

## ORDER.

At a General Session of the *Interstate Commerce Commission* held at its office in Washington, D. C., on the 20th day of September, A. D., 1917.

*In the Matter of Rules and Instructions for the Inspection and Testing of Steam Locomotives and Tenders in Accordance With Act of February 17, 1911, Amended March 4, 1915.*

Whereas, at a conference held in the office of the Chief Inspector of Locomotives on September 5 and 6, 1917, to consider modifications of the rules and instructions for the inspection and testing of locomotives and tenders and their appurtenances, which were prepared jointly by the Mechanical Advisory Sub-Committee of the American Railway Association's Special Committee on Relation of Railway Operation to Legislation and the Sub-committee on Military Equipment Standards, Special Committee on National Defense American Railway Association, and proposed by the committee representing the carriers, on account of the present international crisis, certain modifications were agreed upon by the representatives of the carriers, the representatives of the employees and the Chief Inspector; therefore,

*It is ordered*, That effective at once and to continue in force during the period of the war, except where otherwise specifically stated, rules 2, 10, 16, 23, 110, 112(b), 128(d), 142(c) and 150(a) shall be modified as follows, except where conditions are such that the safety of operation is adversely affected thereby:

*Rule 2:* The lowest factor of safety for locomotive boilers which were in service or under construction prior to January 1, 1912, shall be 3.25.

Effective six months after the close of the war the lowest factor of safety shall be 3.5.

The dates on which factors of safety from 3.5 to 4, as provided in rule 2 become effective, shall be advanced for a period equivalent to the duration of the war.

*Rule 10: Flues to be removed.*—All flues of boilers in service, except as otherwise provided, shall be removed at least once every four years, and a thorough examination shall be made of the entire interior of the boiler. After flues are taken out the inside of the boiler must have the scale removed and be thoroughly cleaned. This period for the removal of flues may be extended upon application if an investigation shows that conditions warrant it.

*Rule 16:* The date for removal of lagging for the purpose of inspecting the exterior of locomotive boilers as provided by rule 16, except where indication of leaks exist, shall be advanced for a period equivalent to the duration of the war.

*Rule 23. Method of testing flexible staybolts with caps.*—

All flexible staybolts having caps over the outer ends shall have the caps removed at least once every two years and also whenever the United States Inspector or the railroad company's inspector considers the removal desirable in order to thoroughly inspect the staybolts.

The fire box sheets should be examined carefully at least once a month to detect any bulging or indications of broken staybolts. Each time a hydrostatic test is applied the hammer test required by rules 21 and 22 shall be made while the boiler is under hydrostatic pressure not less than the allowed working pressure, and proper notation of such test made on form No. 3.

*Rule 110: Time of cleaning.—*

Distributing or control valves, reducing valves, triple valves, straight-air double-check valves, and dirt collectors shall be cleaned as often as conditions require to maintain them in a safe and suitable condition for service, but not less frequently than once every six months.

*Add to Rule 112:* On E. T. or similar equipment where the brake cylinder pressure is maintained regardless of piston travel the maximum piston travel for driving wheel brakes shall be eight inches.

*Rule 128(d); Locomotives in road service.—*

The total amount of side motion of rods on crank pins shall not exceed one-fourth inch.

*Locomotives in yard service.—*

The total amount of side motion of rods on crank pins shall not exceed five-sixteenths inch.

*Rule 142(c):* Top leaf broken or two leaves in top half or any three leaves in spring broken. (The long side of spring to be considered the top).

*Rule 150(a):* The minimum height of flange for driving and trailing wheel tires, measured from tread, shall be 1 inch for locomotives used in road service, except that on locomotives where construction will not permit the full height of flange on all drivers the minimum height of flange on one pair or driving wheels may be five-eighths inch

By the Commission:

(SEAL)

GEORGE B. MCGINTY,  
Secretary.

#### ORDER.

At a General Session of the *Interstate Commerce Commission*, held at its office in Washington, D. C., on the 22nd day of September, A. D., 1917.

*In the Matter of Rules and Instructions for the Inspection and Testing of Steam Locomotives and Tenders in Accordance With Act of February 17, 1911, Amended March 4, 1915.*

Upon further consideration of the matters and things involved in the above entitled proceeding, and good reason appearing therefor;

*It is ordered,* That the last paragraph of the order entered in this proceeding on December 26, 1916, be, and it is hereby, modified to read as follows:

*It is further ordered,* That the said rules numbered 29 and 31 shall apply to all new locomotives placed in service after January 1, 1918, and for locomotives in service prior to that date the changes required by the above rules shall be made the first time locomotives

are shopped for general or heavy repairs after January 1, 1918, and all locomotives must be so equipped before July 1, 1920:

That in all other respects the said order of December 26, 1916, shall remain in full force and effect.

By the Commission:

(SEAL)

GEORGE B. MCGINTY,  
Secretary.

#### ORDER.

At a General Session of the *Interstate Commerce Commission* held at its office in Washington, D. C., on the 17th day of December, A. D., 1917.

*In the Matter of Rules and Instructions for the Inspection and Testing of Steam Locomotives and Tenders in Accordance with Act of February 17, 1911, Amended March 4, 1915.*

In view of the pressure upon the railroads for equipment in moving war materials;

*It is ordered*, That the last paragraph of the order entered in this proceeding on December 26, 1916, be, and it is hereby, modified to read as follows:

*It is further ordered*, That the said rules numbered 29 and 31 shall apply to all new locomotives placed in service after July 1, 1918, and for locomotives inservice prior to that date the changes required by the above rules shall be made the first time locomotives are shopped for general or heavy repairs after July 1, 1918, and all locomotives must be so equipped before July 1, 1920:

That in all other respects the said order of December 26, 1916, shall remain in full force and effect.

By the Commission:

(SEAL)

GEORGE B. MCGINTY,  
Secretary,



## APPENDIX L.

### THE FEDERAL 28-HOUR LIVE STOCK LAW.

AN ACT to prevent cruelty to animals while in transit by railroad or other means of transportation from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, and repealing sections forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the United States Revised Statutes.

Sec. 1. That no railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of railroad over which cattle, sheep, swine, or other animals shall be conveyed from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight: *Provided*, That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this Act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: *Provided*, That it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

Sec. 2. That animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water,

receiver, trustee, or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food, care, and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section one of this Act; but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires.

Sec. 3. That any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or the master or owner of any steam, sailing, or other vessel who knowingly and wilfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars: *Provided*, That when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest the provisions in regard to their being unloaded shall not apply.

Sec. 4. That the penalty created by the preceding section shall be recovered by civil action in the name of the United States in the circuit or district court holden within the district where the violation may have been committed or the person or corporation resides or carries on business; and it shall be the duty of United States attorneys to prosecute all violations of this Act reported by the Secretary of Agriculture, or which come to their notice or knowledge by other means.

Sec. 5. That sections forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the Revised Statutes of the United States be, and the same are hereby, repealed.

Approved, June 29, 1906.

## APPENDIX M.

### THE FEDERAL ASH PAN ACT.

AN ACT to promote the safety of employes on railroads.

Section 1. On and after the first day of January, nineteen hundred and ten, it shall be unlawful for any common carrier engaged in interstate or foreign commerce by railroad to use any locomotive in moving interstate or foreign traffic, not equipped with an ash pan, which can be dumped or emptied and cleaned without the necessity of any employ going under such locomotive.

Sec. 2. On and after the first day of January, nineteen hundred and ten, it shall be unlawful for any common carrier by railroad in any Territory of the United States or of the District of Columbia to use any locomotive not equipped with an ash pan, which can be dumped or emptied and cleared without the necessity of any employe going under such locomotive.

Sec. 3. Any such common carrier using any locomotive in violation of any of the provisions of this act shall be liable to a penalty of two hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge.

Sec. 4. It shall be the duty of the Interstate Commerce Commission to enforce the provisions of this act, and all powers heretofore granted to said Commission are hereby extended to it for the purpose of the enforcement of this act.

Sec. 5. The term "common carrier" as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

Sec. 6. Nothing in this act contained shall apply to any locomotive upon which, by reason of the use of oil, electricity, or other such agency, an ash pan is not necessary.

## APPENDIX N.

### THE FEDERAL ACCIDENT REPORTS ACT.

AN ACT requiring common carriers engaged in interstate and foreign commerce to make full reports of all accidents to the Interstate Commerce Commission, and authorizing investigations thereof by said Commission.

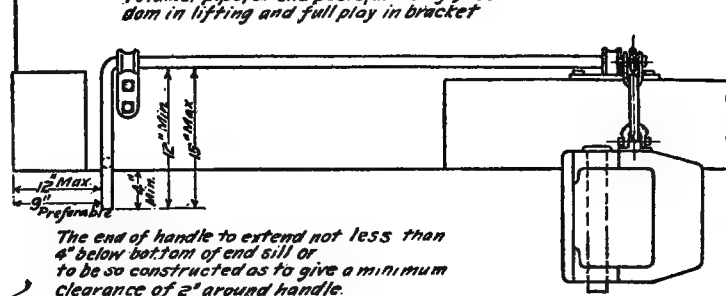
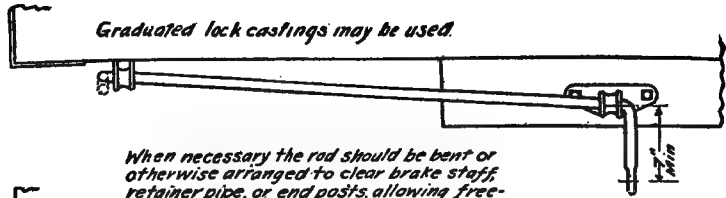
Sec. 1. That it shall be the duty of the general manager, superintendent, or other proper officer of every common carrier engaged in interstate or foreign commerce by railroad to make to the Interstate Commerce Commission, at its office in Washington, District of Columbia, a monthly report, under oath, of all collisions, derailments, or other accidents resulting in injury to persons, equipment, or roadbed arising from the operation of such railroad under such rules and regulations as may be prescribed by the said Commission, which report shall state the nature and causes thereof and the circumstances connected therewith: *Provided*, That hereafter all said carriers shall be relieved from the duty of reporting accidents in their annual financial and operating reports made to the Commission.

Sec. 2. That any common carrier failing to make such report within thirty days after the end of any month shall be deemed guilty of a misdemeanor, and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not more than one hundred dollars for each and every offence and for every day during which it shall fail to make such report after the time herein specified for making the same.

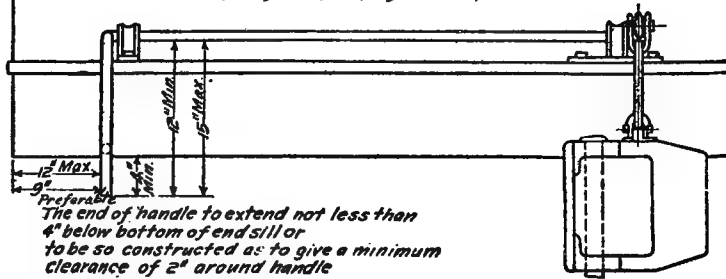
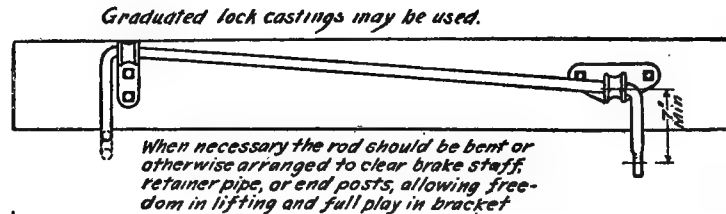
Sec. 3. That the Interstate Commerce Commission shall have authority to investigate all collisions, derailments, or other accidents resulting in serious injury to person or to the property of a railroad occurring on the line of any common carrier engaged in interstate or foreign commerce by railroad. The Commission, or any impartial investigator, thereunto authorized by said Commission, shall have authority to investigate such collisions, derailments, or other accidents aforesaid, and all the attending facts, conditions, circumstances, and for that purpose may subpoena witnesses, administer oaths, take testimony, and require the production of books, papers, orders, memoranda, exhibits, and other evidence, and shall be provided by said carriers with all reasonable facilities: *Provided*, That when such accident is investigated by a commission of the State in which it occurred, the Interstate Commerce Commission shall, if convenient, make any investigation it may have previously determined upon, at the same time as, and in connection with, the state commission investigation. Said Commission shall, when it deems it to the public interest, make reports of such investigations, stating the cause of accident, together with such recommendations as it deems proper. Such reports shall be made public in such manner as the Commission deems proper.

Sec. 4. That neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any

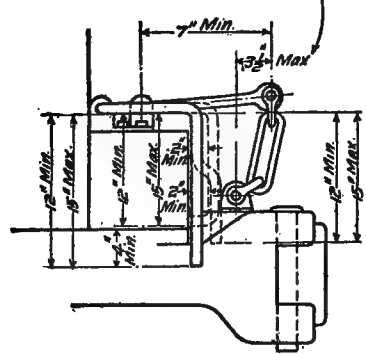
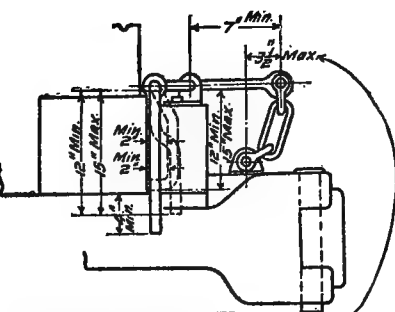




Application to concealed endsill cars



Application to outside endsill cars



purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation.

Sec. 5. That the Interstate Commerce Commission is authorized to prescribe for such common carriers a method and form for making the reports hereinbefore provided.

Sec. 6. That the Act entitled "An Act requiring common carriers engaged in interstate commerce to make full reports of all accidents to the Interstate Commerce Commission," approved March third, nineteen hundred and one, is hereby repealed.

Sec. 7. That the term "interstate commerce," as used in this Act, shall include transportation from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, and the term "foreign commerce," as used in this Act, shall include transportation from any State or Territory or the District of Columbia to any foreign country and from any foreign country to any State or Territory or the District of Columbia.

Sec. 8. That this Act shall take effect sixty days after its passage.

## APPENDIX O.

### THE ADAMSON LAW.

AN ACT to establish an eight-hour day for employes of carriers engaged in interstate and foreign commerce, and for other purposes.

Sec. 1 That beginning January first, 1917, eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employes who are now or may hereafter be employed by any common carrier by railroad, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, which is subject to the provisions of the Act of February fourth, eighteen hundred and eighty-seven, entitled "An Act to regulate commerce," as amended, and who are now or may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, from any State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States: *Provided*, That the above exceptions shall not apply to railroads less than one hundred miles in length whose principal business is leasing or furnishing terminal or transfer facilities to other railroads, or are themselves engaged in transfers of freight between railroads or between railroads and industrial plants.

Sec. 2. That the President shall appoint a commission of three, which shall observe the operation and effects of the institution of the eight-hour standard workday as above defined and the facts and conditions affecting the relations between such common carriers and employes during a period of not less than six months nor more than nine months, in the discretion of the commission, and within thirty days thereafter such commission shall report its findings to the President and Congress; that each member of the commission created under the provisions of this Act shall receive such compensation as may be fixed by the President. That the sum of \$25,000, or so much thereof as may be necessary, be, and hereby is appropriated, out of any money in the United States Treasury not otherwise appropriated, for the necessary and proper expenses incurred in connection with the work of such commission, including salaries, per diem, traveling expenses of members and employes, and rent, furniture, office fixtures and supplies, books, salaries, and other necessary expenses, the same to be approved by the chairman of said commission and audited by the proper accounting officers of the Treasury.



Sec. 3. That pending the report of the commission herein provided for and for a period of thirty days thereafter the compensation of railway employes subject to this Act for a standard eight-hour workday shall not be reduced below the present standard day's wage, and for all necessary time in excess of eight hours such employe shall be paid at a rate not less than the pro rata rate for such standard eight-hour workday.

Sec. 4. That any person violating any provision of this Act shall be guilty of a misdemeanor and upon conviction shall be fined not less than \$100 and not more than \$1,000, or imprisoned not to exceed one year, or both.

Approved September 3, 1916.

Approved September 5, 1916.

## APPENDIX P.

### THE FEDERAL TRANSPORTATION OF EXPLOSIVES ACT.

AN ACT to promote the safe transportation in interstate commerce of explosives and other dangerous articles, and to provide penalties for its violation.

By an Act entitled "An Act to codify, revise, and amend the penal laws of the United States," approved March 4, 1909, to take effect and be in force on and after the first day of January, 1910, the Act entitled "An Act to promote the safe transportation in interstate commerce of explosives and other dangerous articles, and to provide penalties for its violation," approved May 30, 1908, is repealed, and the following sections of said Act to codify, revise, and amend the penal laws of the United States are substituted therefor:

Sec. 232. It shall be unlawful to transport, carry, or convey, any dynamite, gunpowder, or other explosives, between a place in a foreign country and a place within or subject to the jurisdiction of the United States, or between a place in any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, and a place in any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, on any vessel or vehicle of any description operated by a common carrier, which vessel or vehicle is carrying passengers for hire: *Provided*, That it shall be lawful to transport on any such vessel or vehicle small arms ammunition in any quantity, and such fuses, torpedoes, rockets, or other signal devices, as may be essential to promote safety in operation, and properly packed and marked samples of explosives for laboratory examination, not exceeding a net weight of one-half pound each, and not exceeding twenty samples at one time in a single vessel or vehicle; but such samples shall not be carried in that part of a vessel or vehicle which is intended for the transportation of passengers for hire: *Provided, further*, That nothing in this section shall be construed to prevent the transportation of military or naval forces with their accompanying munitions of war on passenger equipment vessels or vehicles.

Sec. 233. The Interstate Commerce Commission shall formulate regulations for the safe transportation of explosives, which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives by land. Said Commission, of its own motion, or upon application made by any interested party, may make changes or modifications in such regulations, made desirable by new information or altered conditions. Such regulations shall be in accord with the best known practicable means for securing safety in transit, covering the packing, marking, loading, handling while in transit, and the precautions necessary to determine whether the material when offered is in proper condition to transport. Such regulations, as well as all changes or modifications thereof, shall take effect ninety days after their formulation and publication by said Commission and shall be in effect until reversed, set aside, or modified.

Sec. 234. It shall be unlawful to transport, carry, or convey, liquid nitroglycerin, fulminate in bulk in dry condition, or other like explosive, between a place in a foreign country and a place within or subject to the jurisdiction of the United States, or between a place in one State, Territory, or District of the United States, or a place noncontiguous to but subject to the jurisdiction thereof, and a place in any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, on any vessel or vehicle of any description operated by a common carrier in the transportation of passengers or articles of commerce by land or water.

Sec. 235. Every package containing explosives or other dangerous articles when presented to a common carrier for shipment shall have plainly marked on the outside thereof the contents thereof; and it shall be unlawful for any person to deliver, or cause to be delivered, to any common carrier engaged in interstate or foreign commerce by land or water, for interstate or foreign transportation, or to carry upon any vessel or vehicle engaged in interstate or foreign transportation, any explosive, or other dangerous article, under any false or deceptive marking, description, invoice, shipping order, or other declaration, or without informing the agent of such carrier of the true character thereof, at or before the time such delivery or carriage is made. Whoever shall knowingly violate, or cause to be violated, any provision of this section, or of the three sections last preceding, or any regulation made by the Interstate Commerce Commission in pursuance thereof, shall be fined not more than two thousand dollars; or imprisoned not more than eighteen months, or both.

Sec. 236. When the death or bodily injury of any person is caused by the explosion of any article named in the four sections last preceding, while the same is being placed upon any vessel or vehicle to be transported in violation thereof, or while the same is being so transported, or while the same is being removed from such vessel or vehicle, the person knowingly placing, or aiding or permitting the placing, of such articles upon any such vessel or vehicle, to be so transported, shall be imprisoned not more than ten years.

## APPENDIX Q.

### GENERAL ORDERS OF DIRECTOR GENERAL OF RAILROADS UNDER FEDERAL CONTROL ACT OF 1918.

#### GENERAL ORDER NO. 1.

Washington, D. C., December 29th, 1917.

*To All Concerned:*

Pursuant to the order of the President of the United States, through the Secretary of War, the undersigned, as Director General of Railroads, has taken possession and assumed control of certain transportation systems described in the proclamation of the President, of which proclamation and order officers, agents and employes of said transportation systems are to take immediate and careful notice.

#### ALL EMPLOYES TO CONTINUE.

In addition to the provisions therein contained it is, until further ordered, directed that—

1. All officers, agents and employes of such transportation systems may continue in the performance of their present regular duties, reporting to the same offices as heretofore and on the same terms of employment.

2. Any officer, agent or employe desiring to retire from his employment shall give the usual and seasonable notice to the proper officer to the end that there may be no interruption or impairment of the transportation service required for the successful conduct of the war and the needs of general commerce.

#### NATIONAL NEEDS PARAMOUNT.

3. All transportation systems covered by said proclamation and order shall be operated as a national system of transportation, the common and national needs being in all instances held paramount to any actual or supposed corporate advantage. All terminals, parts, locomotives, rolling stock, and other transportation facilities are to be fully utilized to carry out this purpose without regard to ownership.

4. The designation of routes by shippers is to be disregarded when speed and efficiency of transportation service may thus be promoted.

5. Traffic agreements between carriers must not be permitted to interfere with expeditious movements.

#### THROUGH ROUTINGS TO BE ESTABLISHED.

6. Through routes which have not heretofore been established because of short hauling or other causes are to be established and used whenever expedition and efficiency of traffic will thereby be promoted; and if difficulty is experienced in such through routing notice thereof shall, by carriers or shippers or both, be given at once to the director by wire.

7. Existing schedules or rates and outstanding orders of the Interstate Commerce Commission are to be observed, but any such schedules or rates or orders as may hereafter be found to conflict with the purposes of said proclamation or with this order shall be brought immediately by wire to the attention of the director.

(Signed) W. G. McADOO,  
Director General of Railroads.

#### GENERAL ORDER NO. 2.

OFFICE OF THE DIRECTOR GENERAL OF RAILROADS.

Washington, D. C. December 29, 1917.

*To the Chief Executive of the Railroads:*

Pursuant to the authority vested in me by the President of the United States in his proclamation of December 26, 1917, wherein it was stated that for purposes of accounting, possession and control of the railroads shall date from 12:00 o'clock midnight on December 31, 1917, you are notified that, until otherwise directed, no changes in the present methods of accounting as prescribed by the Interstate Commerce Commission will be required. The accounts of your respective companies shall be closed as of December 31, 1917, and opened as of January 1, 1918, in the same manner as they have heretofore been handled at the close of one fiscal period and the beginning of another; and in the same manner that you should have handled your accounts had the Government not taken possession and control.

WILLIAM G. McADOO,  
Director General of Railroads.

#### GENERAL ORDER NO. 3.

All carriers by railroad, subject to the jurisdiction of the undersigned, are hereby ordered and directed forthwith to publish and file, and to continue in effect until further order, tariffs effective January 21, 1918, wherein demurrage rules, regulations and charges shall be changed so as to provide.

A. (1) Forty-eight hours (two days) free time for loading or unloading on all commodities.

(2) Twenty-four hours (one day) free time on cars held for any other purpose permitted by tariff.

B. Demurrage charges per car per day or fraction of a day until car is released, as follows: Three dollars for the first day, \$4.00 for the second day, and for each succeeding additional day the charge to be increased \$1.00 in excess of that for the preceding day until a maximum charge of \$10.00 per car per day shall be reached on the eighth day of detention beyond free time, the charge thereafter to be \$10.00 per car per day or fraction thereof. These charges will supersede all those named in existing tariffs applicable to domestic freight, and specifically contemplate the cancellation of all average agreement provisions of existing tariffs.

No change is authorized hereby to be made in demurrage rules, regulations and charges applying on foreign export freight awaiting ships at export points.

Upon my request, the Interstate Commerce Commission has issued Fifteenth Section Order No. 225 authorizing the filing of tariffs to accord with this order to become effective January 21, 1918, on one day's notice.

Carriers shall immediately file said tariffs with appropriate state commissions or other state authorities.

Dated at Washington, this fifth day of January, 1918.

W. G. McAdoo,

Director General of Railroads.

#### FIFTEENTH SECTION ORDER NO. 225.

At a Session of DIVISION 2 of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 5th day of January A. D. 1918.

EDGAR E. CLARK,  
WINTHROP M. DANIELS, } Commissioners.  
ROBERT W. WOOLEY,

Application under Section 15 of the Act to Regulate Commerce, as amended August 9, 1917, for approval for filing of an increased rate, fare, charge, or classification.

#### DEMMURAGE RULES, REGULATIONS AND CHARGES.

The Director General of Railroads having requested the Commission's approval for filing tariffs containing changes in demurrage rules, regulations and charges in compliance with his order No. 3 of January 5, 1918, effective January 21, 1918, so as to provide as follows:

"A. (1) Forty-eight hours (two days) free time for loading or unloading on all commodities.

(2) Twenty-four hours (one-day) free time on cars held for any other purpose permitted by tariff.

B. Demurrage charges per car per day or fraction of a day until car is released, as follows: \$3.00 for the first day, \$4.00 for the second day, and for each succeeding additional day the charge to be increased \$1.00 in excess of that for the preceding day until a maximum charge of \$10.00 per car per day shall be reached on the eighth day of detention beyond free time, the charge thereafter to be \$10.00 per car per day or fraction thereof. These charges will supersede all those named in existing tariffs applicable to domestic freight, and specifically contemplate the cancelation of all average agreement provisions of existing tariffs.

No change is authorized hereby to be made in demurrage rules, regulations and charges applying on foreign export freight awaiting ships at export points."

*It is ordered*, That the rules, regulations and charges herein above set forth be, and they are hereby, approved for filing, without formal hearing, which approval shall not affect any subsequent proceeding relative thereto;

*It is further ordered*, That said tariffs may be filed, effective January 21st, 1918, upon not less than one (1) day's notice to the Commission and to the general public in the manner prescribed in Section 6 of the Act to Regulate Commerce;

*And it is further ordered*, That the tariffs filed under authority of this order shall bear on title pages thereof the following notation:

Increased demurrage rules, regulations and charges in this tariff are filed on one day's notice under authority of the Interstate Commerce Commission's Fifteenth Section Order No. 225 of January 5, 1918, without formal hearing, which approval shall not affect any subsequent proceeding relative thereto.

By the Commission, Division 2:

(SEAL)

GEORGE B. MCGINTY,  
Secretary.

#### GENERAL ORDER NO. 4.

DIRECTOR GENERAL OF RAILROADS

Washington.

January 18, 1918.

For purposes of operating the railroads of the United States will be classified as Eastern Railroads, Southern Railroads and Western Railroads, defined as follows:

**EASTERN RAILROADS**—The railroads in that portion of the United States north of the Ohio and Potomac Rivers and east of Lake Michigan and the Indiana-Illinois State line; also those railroads in Illinois extending into that State from points east of the Indiana-Illinois State line; also the Chesapeake & Ohio, the Norfolk & Western and the Virginian railways.

**SOUTHERN RAILROADS**—All railroads in that portion of the United States south of the Ohio and Potomac Rivers and east of the Mississippi River, except the Chesapeake & Ohio, Norfolk & Western and the Virginian railways; and also those railroads in Illinois and Indiana extending into those states from points south of the Ohio River.

**WESTERN RAILROADS**—All railroads not included in the above definitions and, broadly speaking, all railroads in the territory west of Lake Michigan and of the Indiana-Illinois State line to the Ohio River and west of the Mississippi River from the Ohio River to the Gulf of Mexico, excepting those railroads in Illinois included in Eastern Territory, and those railroads in Illinois and Indiana included in Southern Territory, as above stated.

Mr. A. H. Smith, President of the New York Central, is appointed Regional Director, with office at New York, in charge of the operation of Eastern Railroads.

Mr. C. H. Markham, President of the Illinois Central, is appointed Regional Director; with office at Atlanta, in charge of the operation of Southern Railroads.

Mr. R. H. Aishton, President of the Chicago & North Western, is appointed Regional Director, with office at Chicago, in charge of the operation of Western Railroads.

Orders issued by the gentlemen named in their capacity as Regional Directors will be issued by authority of the Director General and will be respected accordingly.

W. G. McADOO,  
Director General of Railroads.

GENERAL ORDER NO. 5.  
DIRECTOR GENERAL OF RAILROADS  
Washington.

January 18, 1918.

Pursuant to the authority vested in me as Director General of Railroads by the President of the United States in his proclamation of December 26, 1917, I hereby create a Railroad Wage Commission and name as the member thereof, Franklin K. Lane, Secretary of the Interior; Charles C. McChord, member of the Interstate Commerce Commission; J. Harry Covington, Chief Justice of the Supreme Court of the District of Columbia and William R. Willcox of New York.

IT IS ORDERED AND DIRECTED THAT:

The Commission shall make a general investigation of the compensation of persons in the railroad service, the relation of railroad wages to wages in other industries, the conditions respecting wages in different parts of the country, the special emergency respecting wages which exists at this time owing to war relation between different classes of railroad labor.

The Commission shall begin its labors at once, and make report to the Director General, giving its recommendations in general terms as to changes in existing compensations that should be made.

Officers, agents and employes of the railroads are directed to furnish to the Railroad Wage Commission upon request all information it may require in the course of its investigation.

W. G. McADOO,  
Director General of Railroads.

GENERAL ORDER NO. 6.  
DIRECTOR GENERAL OF RAILROADS  
Washington.

January 29, 1918.

TO OFFICERS AND DIRECTORS OF RAILROAD COMPANIES.

During the period of possession, operation and Government control of railroads, it is necessary that officers, directors, and agents of railroad companies be very careful in the handling of moneys and in the dealing with transportation matters. Without attempting at this time to give general directions, there are a few matters involving the expenditure of money for purposes having no direct relation to transportation, which should receive immediate attention; as well as the issuance of free transportation.

It is therefore ordered that the carriers' operating revenues shall not be expended:

1. For the payment of agents or other persons who are employed in any way to affect legislation.
2. For the employment of attorneys who are not actually engaged in the performance of necessary legal work for the company.
3. For the payment of the expenses of persons or agencies constituting associations of carriers unless such association is approved in advance by the Director General.



4. For any political purpose or to directly or indirectly influence the election of any person or an election affecting any public measures.

#### ISSUANCE OF FREE PASSES.

No passes or free transportation shall be issued by any carrier under Federal control or any official of such carrier unless the issuance of such free transportation is expressly authorized by the Act of Congress entitled "An Act to Regulate Commerce, Approved February 4, 1887, and Amendments thereto;" and any such passes or free transportation heretofore issued not in conformity with said act must be recalled.

This order applies to all carriers under Federal control, whether inter-state or intra-state.

W. G. McAdoo,  
Director General of Railroads.

#### SUPPLEMENT TO GENERAL ORDER NO. 6.

UNITED STATES RAILROAD ADMINISTRATION.  
Office of the Director General  
Washington.

March 26, 1918.

On the 28th day of January, 1918, General Order No. 6 was issued prohibiting the issuance of free transportation except as expressly authorized by the Act of Congress approved February 4, 1887, and amendments thereto.

The carriers in obedience to said order, withdrew the passes or mileage books which had theretofore been issued pursuant to contracts for newspaper advertising, the issuance thereof interstate having been held unlawful by the Supreme Court of the United States (219 U. S., 486).

It later came to my attention that contracts for newspaper advertising to be paid for in transportation at a fixed rate had been made in various sections of the country; that mileage books had been issued pursuant to such contracts; and that the war tax thereon had been paid as required by law. It seemed to me important, therefore, that the legality of such contracts should be passed upon by the Interstate Commerce Commission. Accordingly this, and a number of other questions growing out of General Order No. 6, was referred by me to the Interstate Commerce Commission for consideration.

I am in receipt of its report dealing only with this question, in which it is said:

"In view of the circumstances \* \* \* we are inclined to suggest the advisability of modification of the Director General's Order No. 6 to the extent of permitting a continuance of contracts already made for the exchange of intrastate passenger transportation for advertising to the termination of such contracts, but in no instance beyond the end of the current calendar year. We recommend such modification of the order, but suggest that in connection therewith it be made entirely clear that it applies only to contracts now in effect, and which are not repugnant to state requirements; that it

authorized only completion of such contracts which expire prior to the end of the present calendar year, and a continuance only to the end of the year of any which may by their terms terminate at a later date. It should also, we think, be made clear that transportation issued under such contract may not be used in connection with other transportation on any interstate journey."

It is therefore ordered that the said General Order No. 6 be and the same is modified accordingly, and the carriers will be permitted to recognize the validity of said contracts and honor transportation to the extent recommended by said Commission.

W. G. McAdoo,

Director General of Railroads.

#### GENERAL ORDER NO. 7.

DIRECTOR GENERAL OF RAILROADS.

Interstate Commerce Building

Washington, D. C.

All carriers by railroads, subject to the jurisdiction of the undersigned, are hereby ordered and directed forthwith to publish and file, and to continue in effect until further order, tariffs in the form shown in the attached appendix, effective February 10, 1918, wherein demurrage rules, regulations, and charges shall be changed so as to provide:

A. (1) Forty-eight hours (two days) free time for loading or unloading on all commodities.

(2) Twenty-four hours (one day) free time on cars held for any other purpose permitted by tariff.

B. That the average agreement rule be permitted, but that it apply solely to cars held for unloading.

C. That under the average rule the number of days on which debits accrue be made four instead of five.

D. That the demurrage charge on all cars, after the expiration of the free time allowed, be \$3 for each of the first four days, \$6 for each of the next three days, and \$10 for each succeeding day.

E. That the bunching rule be reinstated with the following change in paragraph 2:

#### CARS FOR UNLOADING OR RECONSIGNING.

When, as the result of the act or neglect of any carrier, cars originating at the same point or at intermediate points moving via the same route and destined for one consignee, at one point, are bunched at originating point, in transit, or at destination, and delivered by the carrier in accumulated numbers in excess of daily shipments, the consignee shall be allowed such free time as he would have been entitled to had the cars been delivered in accordance with the daily rate of shipment. Claim to be presented to carriers' agent within fifteen (15) days.

These charges will supersede all those named in any existing tariffs applicable to carload freight except:

1. Cars loaded with live stock.

2. Empty cars placed for loading coal at mines or mine sidings or coke at coke ovens and cars under load at mines or mine sidings or coke at coke ovens.

3. Foreign export freight awaiting ships at ports.

4. Coal for transshipment at tidewater or lake ports.

5. Empty private cars stored on railroad or private tracks, provided such cars have not been placed or tendered for loading on the orders of a shipper.

and specifically contemplate the cancellation of all conflicting provisions of existing tariffs.

Upon my request the Interstate Commerce Commission has issued Fifteenth Section Order No. 300, authorizing the filing of tariffs to accord with the appendix hereto and to become effective February 10, 1918, on one day's notice.

Carriers shall immediately file said tariffs with appropriate State commissions or other State authorities.

Order No. 3 is hereby withdrawn and canceled.

Washington, D. C., January 29, 1918.

W. G. McAdoo,

Director General of Railroads.

#### GENERAL ORDER NO. 8.

DIRECTOR GENERAL OF RAILROADS.

Washington, February 21, 1918.

To correct wrong impressions that may exist regarding the employment and conditions of labor in railway service, it is until further order directed that—

1. All acts of Congress to promote the safety of employees and travelers upon the railroads, including acts requiring investigation of accidents on railroads, and orders of the Interstate Commerce Commission made in accordance therewith, must be fully complied with. These acts and orders refer to hours of service, safety appliances, and inspection.

Now that the railroads are in the possession and control of the Government, it would be futile to impose fines for violations of said laws and orders upon the Government, therefore it will become the duty of the Director General in the enforcement of said laws and orders to impose punishments for willful and inexcusable violations thereof upon the person or persons responsible therefor, such punishment to be determined by the facts in each case.

2. When the exigencies of the service require it, or when a sufficient number of employees in any department are not available to render the public prompt transportation service, employees will be required to work a reasonable amount of overtime. So far as efficient and economic operation will permit, excessive hours of employment will not be required of employees.

3. The broad question of wages and hours will be passed upon and reported to the Director General as promptly as possible by the present Railroad Wage Commission. Pending a disposition of these matters by the Director General, all requests of employees involving

revisions of schedules or general changes in conditions affecting wages and hours will be held in abeyance by both the managers and employees. Wages, when determined upon, will be made retroactive to January 1, 1918, and adjusted accordingly. Matters of controversy arising under interpretations of existing wage agreements and other matters not relating to wages and hours will take their usual course, and in the event of inability to reach a settlement will be referred to the Director General.

4. In Order No. 1, issued December 29, 1917, the following appeared:

"All officers, agents, and employees of such transportation systems may continue in the performance of their present *regular* duties reporting to the same officers as heretofore and on the same terms of employment."

The impression seems to exist on some railroads that the said order was intended to prevent any change in the terms of employment during governmental operation. The purpose of the order was to confirm all terms of employment existing upon that date, but subject to subsequent modifications deemed advisable for the requirements of the service. Any contrary impression or construction is erroneous. Officers and employees will be governed by the construction here given.

5. No discrimination will be made in the employment, retention, or conditions of employment of employees because of membership or nonmembership in labor organizations.

The Government now being in control of the railroads, the officers and employees of the various companies no longer serve a private interest. All now serve the Government and the public interest only. I want the officers and employees to get the spirit of this new era. Supreme devotion to country, an invincible determination to perform the imperative duties of the hour while the life of the Nation is imperiled by war, must obliterate old enmities and make friends and comrades, of us all. There must be cooperation, not antagonism; confidence, not suspicion; mutual helpfulness, not grudging performance; just consideration, not arbitrary disregard of each other's rights and feelings; a fine discipline based on mutual respect and sympathy; and an earnest desire to serve the great public faithfully and efficiently. This is the new spirit and purpose that must pervade every part and branch of the national railroad service.

America's safety, America's ideals, America's rights are at stake. Democracy and liberty throughout the world depend upon America's valor, America's strength, America's fighting power. We can win and save the world from despotism and bondage only if we pull together. We can not pull apart without ditching the train. Let us go forward with unshakable purpose to do our part superlatively. Then we shall save America, restore peace to a distracted world, and gain for ourselves the coveted distinction and just reward of patriotic service nobly done.

(Signed) W. G. McADOO,  
Director General of Railroads.

## GENERAL ORDER NO. 9.

DIRECTOR GENERAL OF RAILROADS.

Interstate Commerce Building

Washington, D. C.

February 23, 1918.

With reference to officers whose salaries are chargeable to operating expenses, it is hereby ordered:

1. A carrier shall not create an additional office or fill a vacancy in an existing office, except when such step is necessary to the operation of the railroad under the existing conditions of Government possession and control. In cases of doubt, application, with statement of salary proposed, may be made through the Regional Director for the Director General's approval.

2. A carrier shall not fill a vacancy in office of or above the grade of General Manager or create such an office without the approval of the Director General. Application with statement of salary proposed may be made through the Regional Director for the Director General's approval.

3. With reference to general officers and divisions officers, (according to I. C. C. Classification of Steam Railway Employees), receiving \$3,000 or more and less than \$10,000 per year, each carrier shall make to the Regional Director a monthly report showing increase in salaries, appointments (showing salaries therefor) to fill vacancies, and the creation of new positions (showing salaries therefor), beginning with the month of January, 1918,

4. With reference to such general officers and division officers receiving \$10,000 or more per year, such monthly report shall be made in duplicate, and one duplicate shall be sent to the Regional Director and the other duplicate to the Director General.

(Signed)

W. G. McAdoo,

Director General of Railroads.

## GENERAL ORDER NO. 10.

UNITED STATES RAILROAD ADMINISTRATION.

Office of the Director General

Washington, D. C.

March 14, 1918.

Each and every carrier subject to Federal control shall, prior to May 1, 1918, commence taking an inventory of its materials and supplies by actual count, measurement, weight, etc., and shall immediately upon completion thereof adjust such inventory, by additions and deductions, to December 31, 1917; provided, however, that any such carrier that has taken an inventory of its materials and supplies in the form indicated within 90 days prior to December 31, 1917, or subsequent to the latter date, shall not be required to take an additional inventory, but shall adjust the inventory previously taken, by additions and deductions, to December 31, 1917.

The said inventory shall be preserved in the files of the carrier.

(Signed)

W. G. McAdoo,

Director General of Railroads.

## GENERAL ORDER NO. 11.

UNITED STATES RAILROAD ADMINISTRATION.

Office of the Director General.

Washington, D. C., March 16, 1918.

## FOR THE ADOPTION OF UNIVERSAL INTERLINE WAYBILLING AND STANDARD FORMS.

*To Chief Executive Officers of Carriers Subject to Federal Control:*

(1) Effective May 1, 1918, all freight forwarded from one point in the United States to another point in the United States (including freight passing through Canada or Mexico enroute), and moving over two or more railroads or boat lines under Federal Control, must be waybilled through from point of origin to destination, regardless of the absence of joint rates. When destination station is on a railroad not under Federal Control, freight should be waybilled to the junction point with such road; provided, however, that nothing in this paragraph shall prohibit through waybilling arrangements between carriers now under Federal control and others not so controlled.

(2) A separate waybill must be made for each less carload consignment and for each carload; provided, however, that a single waybill may be made to cover a special train moving at a lump sum charge for the train or for shipments which, on account of their length, require more than one car.

(3) Waybills for carload freight must move with the cars. Waybills for less carload freight must be moved with the cars when practicable; otherwise so as to reach the transfer point or destination station with or in advance of the cars. In the event that waybills for solid cars of less carload freight are mailed direct to destination or transfer stations, a separate waybill must be made on standard form, showing destination of car, and bearing notation:

Merchandise car, waybills

Mailed to .....

Junction agents must show stamps on this waybill in the same manner as provided in Paragraph (4).

(4) Complete routing must be specified on each waybill as and when made, in the space provided therefor. Each forwarding junction agent, at points of interchange, must stamp each waybill for freights interchanged in the space at the bottom of the waybill and in the order there shown. Such stamps must show the station at which the interchange is made and the name of the railroad forwarding the freight from such junction, for example:

Jamestown

North &amp; South R. R.

(Stamp must be 1½ inches by ¾ inch.)

(5) When freight moves on a going through rate, each waybill must show freight charges from point of origin to destination.

(6) Freight moving on a combination of rates:

(a) If the billing agent is in possession of all necessary tariffs, the rate and freight charges to and beyond the rate breaking points must be shown successively, one beneath the other, and the total of all freight charges indicated. For example, the rate and freight charges on a shipment from New York, N. Y., to Denver, Colorado, will appear as follows:

	Weight	Rate	Freight
To Miss. River .....	200	\$1.055	\$2.11
Miss. River to Denver .....		1.62	3.24
Total			\$5.35

(b) If the billing agent is not in possession of the rates beyond the rate breaking point, the waybill must be headed to destination, and the rate and freight charges shown to the rate breaking point, with the movement beyond indicated. For example:

	Weight	Rate	Freight
To Miss. River .....	200	\$1.055	\$2.11
Miss River to Denver .....			

In this case the billing agent will stamp or endorse waybill as follows:

"Shipment not rated through.  
Junction or destination agent  
will insert charges omitted."

(Stamp, if used, must be  $1\frac{1}{2}$  inches by  $\frac{3}{8}$  inch.)

(c) The junction receiving agent must revise rates on inbound billing to the rate breaking point, insert the divisions of revenue accruing to the roads up to the rate breaking point, and certify to their correctness, by use of an appropriate rubber stamp reading as follows:

Revised at .....

North & South R. R.

(Stamp must be  $1\frac{1}{2}$  inches by  $\frac{3}{8}$  inch.)

(d) Agents forwarding shipments from rate breaking points must insert rates and freight charges applicable to destination or to the next rate breaking point. If in any case this plan is not practicable arrangements may be made to have such rates and charges inserted by destination agents.

(7) When miscellaneous charges, of any character, accrue in transit, and they are to be collected from consignee, they should be shown as separate items in the freight charges column on waybills, with notation opposite each item indicating the nature of the charge, the point at which it accrued, and the road to which due. In final settlement, such charges will be allowed as an arbitrary to carrier to which they are due.

(8) A standard Form of waybill, (sample attached), is hereby prescribed, and must be used on and after May 1, 1918.

(a) This waybill Form must be printed on paper approximating in weight "80 pounds No. 1 Manila, 24x36."

(b) Only the original and one copy of waybill shall be made. The original must accompany the shipment as herein provided and the copy must be retained by the company making the waybill.

(c) This waybill shall also be used for astray freight.

(d) This waybill is designed to be folded vertically, and left side containing all information for the physical movement of the car.

(e) For special classes of traffic, requiring a larger waybill, the form may be 8½ by 22 inches.

(f) Supplies of waybill forms now on hand, may be used for local business.

(9) The Plan of Audit Office Settlement recommended by the Association of American Railway Accounting Officers, as outlined in that Association's 1917 Synopsis — Paragraphs (16), (17), (18), (28), (29), and (30) shall govern. This plan requires that destination carriers shall make settlement with each of the carriers in interest for its proportion of revenue.

(10) The total freight charges, as reported by destination carrier, and the divisions thereof, must be accepted by all interested carriers as final. No recheck of such settlement will be made, except as to advances and prepaid, and to establish lists of unreported waybills.

(11) The following forms must be used in preparing Audit Office Settlement accounts:

(a) Interline abstract. Form (A.A.R.A.O.) 104.

(b) Division sheet. Form (A.A.R.A.O.) 105.

(c) Summary of interline accounts. Form (A.A.R.A.O.) 110.

These forms are recommended by the Association of American Railway Accounting Officers, and samples are shown in that Association's 1917 Synopsis.

(12) Unless and until otherwise ordered revenues shall be apportioned among carriers in accordance with the route via which the shipment moved, in the following manner:

(a) Where joints through rates are in effect, establish divisions, or any simplifications thereof which may have been perfected, shall be used.

(b) Combination rates shall be divided as made. If one or more of the factors in the combination are joint through rates, such factors shall be divided as provided in sub-paragraph (a) preceding.

(c) When neither of the above division bases can be used, revenues shall be divided on twenty mile block mileage basis, each carrier to be allowed at least twenty miles, and originating and terminal carriers an additional twenty miles each as constructive mileage.

(13) Simplified bases for apportioning inter-road freight revenues are now being considered; upon their determination carriers will be advised thereof in a subsequent order.

(14) Immediate steps shall be taken by each carrier to make the foregoing regulations effective as of May 1, 1918, and to procure supplies of the prescribed waybill and accounting Forms and to issue the necessary instructions to all concerned.

W. G. McADOO,  
Director General.



## GENERAL ORDER NO. 12.

DIRECTOR GENERAL OF RAILROADS  
Interstate Commerce Building,  
Washington.

March 21, 1918.

It is ordered that the following rules be observed with respect to all railroad work involving charges to capital account, viz:

First: In determining what additions and betterments, including equipment, and what road extensions should be treated as necessary, and what work already entered upon should be suspended, please be guided by the following general principles:

- (a) From the financial standpoint it is highly important to avoid the necessity for raising any new capital which is not absolutely necessary for the protection and development of the required transportation facilities to meet the present and prospective needs of the country's business under war conditions. From the standpoint of the available supply of labor and material, it is likewise highly important that this supply shall not be absorbed except for the necessary purposes mentioned in the preceding sentence.
- (b) Please also bear in mind that it may frequently happen that projects which might be regarded as highly meritorious and necessary when viewed from the separate standpoint of a particular company, may not be equally meritorious or necessary under existing conditions, when the Government has possession and control of the railroads generally, and therefore when the facilities heretofore subject to the exclusive control of the separate companies are now available for common use, whenever such common use will promote the movement of traffic.

Second: The construction of new lines or branches or extensions of existing lines shall not be entered upon or contracted for without the Director General's approval.

Third: No new locomotives or cars shall be ordered or constructed without the Director General's approval.

Fourth: Work contracted for or actually commenced prior to January 1, 1918, and unfinished, may be continued until further order, except insofar as in the judgment of the carrier concerned it may be possible to discontinue or curtail it without substantial loss, in order to conform to the general principles outlined in paragraph "First" hereof.

Fifth: Other work which does not involve charges to capital account in excess of \$25,000 may be contracted for and commenced without approval of the Director General provided that:

- (a) It conforms to the policy outlined in paragraph "First" hereof; that
- (b) It also falls clearly within the policy of the particular carrier as that policy has been applied in practice during the two calendar years 1916 and 1917; and that
- (c) A report giving a brief description of each project involving not less than \$5,000 nor more than \$25,000 chargeable to capital account and showing also the amount chargeable

to operating expenses, shall be made in duplicate to the Director of the Division of Capital Expenditures at Washington and Regional Director for the District within ten days after the work shall be contracted for or commenced.

Sixth: No work involving a charge to capital account in excess of \$25,000 shall be contracted for or commenced subsequent to January 1, 1918, unless

(a) it conforms to the policy outlined in paragraph "First" hereof; and unless

(b) it be authorized by the Director General.

Seventh: The Director of the Division of Capital Expenditures is authorized to prescribe such forms, require such reports and issue such regulations and instructions as may be necessary to carry out this order.

W. G. McAdoo,  
Director General of Railroads.

#### GENERAL ORDER NO. 13.

UNITED STATES RAILROAD ADMINISTRATION.

W. G. McAdoo, Director General.

Washington, March 22, 1918.

Whereas practically all of the railroads now under control of the Director General have in existence at this time agreements with the Brotherhood of Locomotive Engineers, Order of Railway Conductors, Brotherhood of Railroad Trainmen, and Brotherhood of Locomotive Firemen and Enginemen which provide for basis of compensation and regulations of employment; and

Whereas in existing circumstances it is the patriotic duty of both officers and employees of the railroads under Federal control, during the present war, promptly and equitably to adjust any controversies which may arise, thereby eliminating misunderstandings which tend to lessen the efficiency of the service:

IT IS HEREBY ORDERED, That the basis arrived at in the annexed understanding between Messrs. A. H. Smith, C. H. Markham, and R. H. Aishton, regional directors, representing the railroads in the eastern, southern and western territories, with the chief executive officers of the Brotherhood of Locomotive Engineers, Order of Railway Conductors, Brotherhood of Railroad Trainmen, and Brotherhood of Locomotive Firemen and Enginemen, be, and the same is hereby, adopted and put into effect as of March 22, 1918.

W. G. McAdoo,  
Director General of Railroads.

*Memorandum of an Understanding Between Messrs. A. H. Smith, C. H. Markham, and R. H. Aishton, Regional Directors, Representing the Railroads in Their Respective Regions, and Mr. W. S. Stone, Grand Chief Engineer Brotherhood of Locomotive Engineers; Mr. A. B. Garretson, President Order of Railway Conductors; Mr. W. G. Lee, President Brotherhood of Railroad Trainmen; Mr. Timothy Shea, Acting President Brotherhood of Locomotive Firemen and Enginemen.*

It is understood, That all controversies growing out of the interpretation or application of the provisions of the wage schedule or agreements which are not promptly adjusted by the officials and the employees on any one of the railroads operated by the Government shall be disposed of in the following manner:

1. There shall be at once created a commission, to be known as the Railway Board of Adjustment No. 1, to consist of eight members, four to be selected by the said regional directors and compensated by the railroads, and one each by the chief executive officer of each of the four organizations of employees hereinbefore named and compensated by such organizations.

2. This Board of Adjustment No. 1 shall meet in the city of Washington, within 10 days after the selection of its members, and elect a chairman and vice chairman, who shall be members of the board. The chairman or vice chairman will preside at meetings of the board, and both will be required to vote upon the adoption of all decisions of the board.

3. The board shall meet regularly, at stated times each month, and continue in session until all matters before it are considered.

4. Unless otherwise mutually agreed, all meetings of the board shall be held in the city of Washington: *Provided*, That the board shall have authority to empower two or more of its members to conduct hearings and pass upon controversies, when properly submitted at any place designated by the board: *Provided further*, That such subdivision of the board will not be authorized to make final decision. All decisions shall be made and approved by the entire board, as herein provided.

5. Should a vacancy occur in the board for any cause, such vacancies shall be immediately filled by the same appointive authority which made the original selection.

6. All authority vested in the Commission of Eight, to adjust disputes arising out of the application of the Eight-Hour Law, is hereby transferred to the Railway Board of Adjustment No. 1, in the same manner as has heretofore been done by the Commission of Eight. All decisions of a general character hertofore made by the Commission of Eight are hereby confirmed, and shall apply to all railroads under governmental operation, unless exempted in said Eight-Hour Law. Decisions which have been rendered by the Commission of Eight, and which apply to individual railroads, shall remain in effect until superseded by decision of the Railway Board of Adjustment No. 1 made in accordance with this understanding.

7. The Board of Adjustment No. 1 shall render decisions on all matters in dispute as provided in the preamble hereof, and when properly submitted to the board.

8. The broad question of wages and hours will be considered by the Railroad Wage Commission, but matters of controversies arising from interpretations of wage agreements, not including matters passed upon by the Railroad Wage Commission, shall be decided by the Railway Board of Adjustment No. 1, when properly presented to it.

9. Wages and hours, when fixed by the Director General, shall be incorporated into existing agreements on the several railroads, and should differences arise between the management and the employees of any of the railroads as to such incorporation, such questions of difference shall be decided by the Railway Board of Adjustment No. 1, when properly presented, subject always to review by the Director General.

10. Personal grievances or controversies arising under interpretation of wage agreements, and all other disputes arising between officials of a railroad and its employees, covered by this understanding, will be handled in their usual manner by general committees of the employees up to and including the chief operating officer of the railroad (or some one officially designated by him), when, if an agreement is not reached, the chairman of the general committee of employees may refer the matter to the chief executive officer of the organization concerned, and if the contention of the employees committee is approved by such executive officer, then the chief operating officer of the railroad and the chief executive officer of the organization concerned shall refer the matter, with all supporting papers, to the Director of the Division of Labor of the United States Railroad Administration, who will in turn present the case to the Railway Board of Adjustment No. 1, which board shall promptly hear and decide the case, giving due notice to the chief operating officer of the railroad interested and to the chief executive officer of the organization concerned of the time set for hearing.

11. No matter will be considered by the Railway Board of Adjustment No. 1 unless officially referred to it in the manner herein prescribed.

12. In hearings before the Railway Board of Adjustment No. 1, in matters properly submitted for its consideration, the railroad shall be represented by such person or persons as may be designated by the chief operating officer, and the employees shall be represented by such person or persons as may be designated by the chief executive officer of the organization concerned.

13. All clerical and office expenses will be paid by the United States Railroad Administration. The railroad directly concerned and the organization involved in a hearing will, respectively, assume any expense incurred in presenting a case.

14. In each case an effort should be made to present a joint concrete statement of facts as to any controversies, but the board is fully authorized to require information in addition to the concrete statement of facts, and may call upon the chief operating officer of the railroad or the chief executive officer of the organization concerned for additional evidence, either oral or written.

15. All decisions of the Railway Board of Adjustment No. 1 shall be approved by a majority vote of all members of the board.

16. After a matter has been considered by the board, and in the event a majority vote can not be obtained, then any four members of the board may elect to refer the matter upon which no decision has

been reached to the Director General of Railroads for a final decision.

17. The Railway Board of Adjustment No. 1 shall keep a complete and accurate record of all matters submitted for its consideration and of all decisions made by the board.

18. A report of all cases decided, including the decision, will be filed with the Director Division of Labor, of the United States Railroad Administration, with the chief operating officer of the railroad affected, the several regional directors, and with the chief executive officers of the organizations concerned.

19. This understanding shall become effective upon its approval by the Director General of Railroads and shall remain in full force and effect during the period of the present war, and thereafter, unless a majority of the regional directors, on the one hand, as representing the railroads, or a majority of the chief executive officers of the organizations, on the other hand, as representing the employees, shall desire to terminate the same, which can, in these circumstances, be done on 30 days' formal notice, or shall be terminated by the Director General himself, at his discretion, on 30 days' formal notice.

Signed and sealed this 22d day of March, 1918.

A. H. SMITH,  
C. H. MARKHAM,  
R. H. AISHTON,

Regional Directors for the Railroads under Government Control.

W. S. STONE,

Grand Chief Engineer Brotherhood of Locomotive Engineers.

A. B. GARRETSON,

President Order of Railway Conductors.

W. G. LEE,

President Brotherhood of Railroad Trainmen.

TIMOTHY SHEA,

Acting President Brotherhood of Locomotive Firemen and Enginemen.

GENERAL ORDER NO. 14.

DIRECTOR GENERAL OF RAILROADS.

Interstate Commerce Building  
Washington.

March 27th, 1918.

The Committee on Transportation, American Railway Association, having at the request of the Director General submitted a report in connection with the Federal Law, "To save Daylight and to provide Standard Time for the United States," which becomes effective at 2:00 A. M., Sunday, March 31, 1918; the following instructions, based on such report, are hereby issued:

First: At 2:00 A. M., Sunday, March 31st, all clocks and watches in train dispatchers' offices, and in all other offices open at that time, must be advanced one hour to indicate 3:00 A. M.

Employees in every open office must, as soon as the change has been made, compare time with the train dispatcher. Clock and watches in all offices at the first opening, at or after the time the change be-

comes effective, must be advanced to conform to the new Standard Time and employees, before assuming duties in such offices, must, after the change is made, compare time with the train dispatcher.

Second: Each Railroad will issue necessary instructions and arrange for such supervision and check of the watches of its employees as to insure that they have been properly changed to conform to the new Standard Time.

Third: Owing to the varying conditions which will prevail on the Railroads of the United States, it is not advisable to issue a uniform rule or order to cover the details involved in the movement of trains at the period the change in Standard Time becomes effective, Therefore, each Railroad must adopt such measures as may be necessary to properly safeguard the movement of its trains on the road at the time of the change.

(Signed) W. G. McAdoo,  
Director General of Railroads.

GENERAL ORDER NO. 15.

UNITED STATES RAILROAD ADMINISTRATION.

Office of the Director General,  
Washington.

March 26, 1918.

The following requirements must be observed in respect of the construction, maintenance and operation of new industry tracks, and in respect of the operation and maintenance of existing industry tracks:

1. As to new industry tracks:

(a) The industry shall pay for, own and maintain that part of the track beyond the right of way of the railroad company;

(b) The railroad company shall pay for, own and maintain that part of the track on the right of way from the switch-point to the clearance point;

(c) Generally speaking, an industry shall pay for and maintain (although in special cases the railroad company may do so), and the railroad company shall own, that part of the track on the right of way from the clearance point to the right of way line:

(d) If the industry fails to maintain in reasonably safe condition the part of the track which it is required to maintain, the railroad company may disconnect the track or refuse to operate over it when not in such condition:

(e) The railroad company shall have the right to use the track when not to the detriment of the industry;

(f) The foregoing terms and conditions should be embodied in a written contract between the industry and the railroad company.

2. Where existing industry tracks are not covered by written contracts, they shall be maintained and operated in accordance with the provisions stated in Paragraph 1 hereof.

3. Where industry tracks are covered by written contracts, such contracts shall be adhered to until otherwise ordered; but where any such contracts appear to work inequalities or injustice the circum-

stances should be brought to the attention of the Regional Director, who will report thereon to the Director General, if conditions seem to warrant.

4. The requirements of State Statutes and of State Commissions in respect of the construction, maintenance and operation of industry tracks shall be complied with, but in cases where such compliances involves what appears to be an unreasonable burden upon the United States Railroad Administration the circumstances should be brought to the attention of the Regional Director, who will report thereon to the Director General, if the condition seem to warrant.

W. G. McAdoo,  
Director General of Railroads.

#### GENERAL ORDER NO. 16.

UNITED STATES RAILROAD ADMINISTRATION.  
Office of the Director General,  
Washington, D. C.

March 28, 1918.

In the organization of the various carriers, some doubt appears at times to exist as to the extent to which, if at all, the executive authority in operating matters is divided between the President of the company and the Chairman of its Board of Directors, or of some committee thereof.

For the purpose of simplification and definiteness it is ordered that the President of each Company shall be treated by the United States Railroad Administration as the company's principal executive authority, (subject to the Director General), in all matters of operation under Federal Control and that Chairman of the Boards of Directors or of some committees thereof shall not exercise functions connected with the operation of the railroads under Federal Control.

W. G. McAdoo,  
Director General of Railroads.

#### GENERAL ORDER NO. 17.

UNITED STATES RAILROAD ADMINISTRATION.  
Office of the Director General,  
Washington, D. C.

April 3, 1918.

*To Chief Executive Officers of Carriers Subject to Federal Control:*

It is hereby ordered that the following rules and regulations shall be observed and shall govern the recording of the accounting for all transactions which arise during Federal control:

(1) For accounting purposes Federal control began as of January 1, 1918. Immediate steps shall be taken by each carrier subject thereto, to open new and separate books of accounts, such as cash books, general and subsidiary ledgers and journals, and all supporting and subsidiary books and records incident thereto, upon which shall be recorded transactions which arise under and are incident to Federal control on and after January 1, 1918. Such books shall be designated and are hereinafter referred to as "Federal Books."

(2) The totals of the accounts "Cash," "Demand loans and deposits," and "Time drafts and deposits" appearing on the corporation's books as of December 31, 1917, shall be transferred to the Federal books, debited to accounts of the same titles, and credited to a deferred liability account styled "(Name of corporation)—Cash—December 31, 1917." On the corporate books the amount of such balances should be transferred to a deferred asset account styled "U. S. Government—Cash—December 31, 1917." All cash transactions subsequent to December 31, 1917, relating to operations prior or subsequent thereto, shall be recorded in the Federal cash book opened as of January 1, 1918.

(3) The total of account "Net balance receivable from agents and conductors" appearing on the corporation's books as of December 31, 1917, shall be transferred to the Federal books, debited to an account of the same title, and credited to a deferred liability account styled "(Name of corporation)—Agents' and Conductors' balances—December 31, 1917." On the corporate books the amount of such balances should be transferred to a deferred asset account styled "U. S. Government—Agents' and Conductors' balances—December 31, 1917."

(4) The total of account "Materials and Supplies" appearing on the corporation's books as of December 31, 1917, shall be transferred to the Federal books, debited to an account of the same title, and credited to a deferred liability account styled "(Name of corporation)—Materials and Supplies—December 31, 1917." On the corporate books the amount of such balance should be transferred to a deferred asset account styled "U. S. Government—Materials and Supplies—December 31, 1917."

(5) In addition to the assets above specified, there shall be likewise transferred to the Federal books and similarly recorded thereon, such other working assets of the corporation as may be mutually agreed upon.

(6) There shall be currently entered, upon such Federal books, in the manner and under the rules and regulations prescribed by the Interstate Commerce Commission or which may hereafter be prescribed, all transactions involving revenues, expenses, taxes and rentals, and other items corresponding to those which constitute the basis upon which the standard return to the carrier shall be determined. Such entries shall include corresponding assets and liabilities and the cash settlement thereof; also all transactions involving materials and supplies subsequent to December 31, 1917.

(7) Transactions of the corporation, including those arising out of cash receipts or disbursements, which do not affect or which do not enter into and form a part of those used in determining the basis of standard return, such as interest and dividends received or paid, miscellaneous rents, and other similar corporate transactions, including additions and betterments, shall not be recorded on or passed through such Federal books unless such transactions be negotiated and conducted for account of the corporation by or under the direction of the Director General. Where such income transactions are negotiated and conducted by or under the direction of the Director Gen-



eral the transactions shall be recorded on the Federal books but credited or charged to an account to be opened, styled "(Name of corporation)—Corporate income transactions." Concurrently, corresponding entries should be made on the corporate books charging or crediting the accounts prescribed by the Interstate Commerce Commission or which may hereafter be prescribed, the offset being in an account styled "U. S. Government—Corporate income transactions." Where additions and betterments are made by or under the direction of the Director General, the expenditures shall be charged on the Federal books to a deferred asset account "(Name of corporation)—Additions and Betterments." Concurrently, entries should be made on the corporate books, charging the appropriate accounts and crediting a deferred liability account "U. S. Government—Additions and Betterments."

(8) Current or operating assets, other than those prescribed in paragraphs (2), (3), (4), and (5) hereof, such as, balances due from individuals and companies, and liabilities, such as, vouchers, payrolls, etc., which were due to or by the corporation as of December 31, 1917, shall not be transferred in detail to the Federal books; but as and when such assets are collected or the liabilities are paid, they shall be credited or debited as the case may be, on the Federal books to a deferred liability account styled "(Name of corporation)—Assets, December 31, 1917, collected," or to a deferred asset account "(Name of corporation)—Liabilities, December 31, 1917, paid." There should be concurrently made, on the corporate books, corresponding entries debiting and crediting the U. S. Government with assets collected and liabilities paid.

(9) Transactions relating to operations, as defined in paragraph (6) hereof, if not previously accrued, shall be included in and shall form a part of the operating results of each carrier regardless of the date thereof. Items clearly applicable to the period prior to January 1, 1918, commonly called "lap-overs," shall be ascertained currently, set up on Federal books, and included in the appropriate accounts as heretofore. At the end of each month, the total of "lap-over" credit items shall be charged to an unadjusted debit account styled "Revenue prior to January 1, 1918," and credited to a deferred liability account styled "(Name of corporation)—Revenue prior to January 1, 1918." The total of "lap-over" debit items shall be credited to an unadjusted credit account styled "Expense prior to January 1, 1918," and charged to a deferred asset account styled "(Name of corporation)—Expense prior to January 1, 1918. Operating revenues which have been accrued currently in accordance with the established practice of the carrier, shall be considered as current revenues and not as "lap-over" items.

(10) The accounts between the U. S. Government and the corporation, for which provision is made herein, shall be adjusted in such manner as may be hereafter agreed upon.

(11) Inquiries as to the interpretation and application of the provisions of this order and the procedure to be observed under its re-

quirements shall be addressed to the Director of Public Service and Accounting.

W. G. McAdoo,  
Director General of Railroads.

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GENERAL ORDER NO. 18.

UNITED STATES RAILROAD ADMINISTRATION.

Office of the Director General,  
Washington, D. C.

April 9, 1918.

Whereas the Act of Congress approved March 21, 1918, entitled *An Act to Provide for the Operation of Transportation Systems While under Federal Control*, provides (Section 10) "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or with any order of the President. \* \* \* But no process, mesne or final, shall be levied against any property under such Federal control;" and

Whereas it appears that suits against the carriers for personal injuries, freight and damage claims, are being brought in states and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose; the effect thereof being that men operating the trains engaged in hauling war materials, troops, munitions, or supplies, are required to leave their trains and attend court as witnesses, and travel sometimes for hundred of miles from their work, necessitating absence from their trains for days and sometimes for a week or more; which practice is highly prejudicial to the just interests of the Government and seriously interferes with the physical operation of the railroads; and the practice of suing in remote jurisdiction is not necessary for the protection of the rights or the just interests of plaintiffs.

*It is therefore ordered,* That all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resides, or in the county or district where the cause of action arose.

W. G. McAdoo,  
Director General of Railroads.

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GENERAL ORDER NO. 18—A.

UNITED STATES RAILROAD ADMINISTRATION

Office of the Director General  
Washington, D. C.

April 18, 1918.

General Order No. 18 issued April 9, 1918, is hereby amended to read as follows:

"It is therefore ordered that all suits against carriers while under Federal control must be brought in the county or district where the

plaintiff resided at the time of the accrual of the cause of the action or in the county or district where the cause of action arose."

W. G. McAdoo  
Director General of Railroads.

GENERAL ORDER NO. 19.

UNITED STATES RAILROAD ADMINISTRATION  
Office of the Director General  
Washington, D. C.

April 13, 1918.

Pursuant to the Proclamation of the President of the United States, the undersigned, as Director General of Railroads, has taken possession and assumed control of the

Clyde Steamship Company,  
Mallory Steamship Company,  
Merchants & Miners Transportation Company, and  
Southern Steamship Company,

at twelve one A.M., Saturday, April Thirteenth, 1918. Until further order it is directed that:

First: All officers, agents and employees of said Steamship Lines may continue in the performance of their present regular duties, reporting to the same officers as heretofore and on the same terms of employment.

Second: Any officer, agent or employee desiring to retire from his employment shall give the usual and seasonable notice to the proper officer to the end that there may be no interruption or impairment of the transportation service required for the successful conduct of the war and the needs of general commerce.

W. G. McAdoo,  
Director General of Railroads.

GENERAL ORDER NO. 20.

UNITED STATES RAILROAD ADMINISTRATION,  
Office of the Director General,  
Washington, D. C.

April 22, 1918.

Effective at once, technical and arithmetical examination and checking of all operating bills such as bills for freight and other claims, joint facilities, car repairs, and other similar bills and all statements of accounts such as distribution of freight and passenger revenues and other similar statements, rendered by one carrier subject to Federal control to or against another carrier subject to Federal control, which accrued or which may accrue on or subsequent to January 1, 1918, shall be discontinued. The carrier rendering such statements, bills, etc., shall take the necessary measures to insure the correctness thereof.

W. G. McAdoo,  
Director General of Railroads.

## GENERAL ORDER NO. 21.

UNITED STATES RAILROAD ADMINISTRATION.

Office of the Director General,  
Washington, D. C.

April 22, 1918.

## (I) Simplified Bases for Apportioning Inter-road Freight Revenues to Carriers Performing the Service:

- (1) Pursuant to the provisions of paragraph (13) of General Order No. 11, dated March 16, 1918, with respect to the adoption of universal interline waybilling, the following regulations will be observed beginning with the May, 1918, accounts in apportioning freight revenues to individual carriers subject to Federal control which perform inter-road freight service.
- (2) In cases where interline billing has been in effect covering all or a major portion of freight traffic interchanged between two or more carriers via the same route, although the interline waybill may not cover the movement from origin to final destination of the traffic:
  - (a) The waybill destination carrier shall determine, from interline division statements for the period of twelve months ended December 31, 1917, the aggregate freight revenue on interline freight traffic from each initial way-billing carrier separately via each route. There shall likewise be determined the amount apportioned to each individual carrier separately via each route. There shall be included in such aggregate freight revenue, and in the amounts due to each carrier, as their interests may appear, terminal allowances, bridge tolls, lighterage, insurance, and other arbitraries. If the interline method of accounting became effective via any route subsequent to January 1, 1917, the division statements for the longest period obtainable (not exceeding twelve months) prior to May 1, 1918, shall be used.
  - (b) From the aggregate freight revenue, and the revenue due to each carrier via each route, ascertained in the manner prescribed in the preceding paragraph, the ratio of the revenue allotted to each carrier via each route to the total revenue shall be determined and stated in two figure percents; such percents shall be designated as "road to road" percents. The percents thus determined for each route shall be used for apportioning the revenue from the traffic moving over it on interline waybills to be accounted for beginning with May, 1918 accounts, until and unless otherwise ordered.
  - (c) When the accounts for commodities moving in large volumes, such as coal, have, as a matter of general practice, been kept separately, separate road to road percents, based on revenues from that class of traffic, may be determined as above prescribed and used in apportioning the revenues therefrom.
- (3) In cases where interline waybilling has not been in effect or where it has been applied to only a small part of the traffic moved between two or more carriers via the same route:
  - (d) Destination carriers of the freight shall apportion and settle the revenues on interline waybills to be accounted for in May, 1918, accounts on bases of established divisions. From the totals of proportions thus settled, des-

tion carriers shall compute two figure percents for traffic from each initial carrier via each route. Such percents are herein designated as "road to road" percents and shall be used thereafter to apportion revenues via such roads and routes respectively, on that class of traffic unless and until otherwise ordered. When traffic moves only in small volume, destination carriers may compute two figure station to station percents based on revenues produced by the application of established division bases, and use such station to station percents instead of the road to road percents.

- (e) In the event freight traffic moves during the month of June, 1918, or thereafter via routes over which there were no freight movements covered by interline waybills prior thereto, destination carriers shall apply the established divisions in apportioning the revenue on such shipments during the month in which the traffic first moves. Thereafter, the revenue on such traffic shall be divided on either road to road or station to station percents as may be applicable.
  - (f) When the accounts for commodities moving in large volumes, such as coal, have, as a matter of general practice, been kept separately, separate road to road percents based on revenues from that class of traffic may be determined as herein prescribed and used in apportioning the revenues therefrom.
  - (4) In cases where freight traffic moves via unusual or diverted routes over which no divisions apply and via which no experience can be obtained, destination carriers shall apportion the revenues therefrom on a twenty mile block mileage basis, each carrier to be allowed at least twenty miles and originating and terminal carriers an additional twenty miles each as constructive mileage.
  - (5) The formulae prescribed herein for apportioning interline freight revenues to carriers performing the service, are intended to preserve, as equitably as practicable, the integrity of the revenues of individual carriers, and their use shall be generally observed. If by reason of new traffic developments, or the abnormal shifting of traffic, the continued application of the road to road percents herein provided for might seriously distort the revenues of interested carriers, the destination carrier may, upon its own initiative or by request, test apportionment of revenues for a specific month or period by applying the established division bases thereto. If results thus obtained vary substantially from the results obtained by the application of road to road per cents as herein provided for, and the change appears to be permanent, application may be made to the Director of Public Service and Accounting to adjust the divisions to such bases as will produce more equitable results. Applications for changed apportionment bases based upon ordinary traffic fluctuations will not be considered.
- (II) Modification of Practices in Accounting for Freight and Related Revenues:
- (6) Destination carriers shall completely revise waybills as to rates, classifications, extensions, footings, weights, etc., thus insuring the correctness of the revenues based on tariffs applicable, and they shall account to interested carriers for their respective proportions of such revenues in the manner hereinbefore prescribed. If flagrant or

- continued use of erroneous rates or classifications be observed by destination carriers, the attention of billing carriers must be specially called thereto. Where ordinary changes or corrections are made in waybilled revenue by destination agents, correction notices need not be made therefor to intermediate or originating carriers, unless advances or prepaid charges be involved.
- (7) Paragraph (10) of General Order No. 11 provides that settlements by destination carriers with all other interested carriers shall be accepted as final. This provision discontinues the adjustment among carriers of overcharges and undercharges in revenue, but does not prohibit the adjustment of differences in advances and prepaid items; clerical errors, in addition and divisions, or errors due to omission, divisions, etc.
- (8) Effective at once no apportionment shall be made among carriers of charges absorbed, such as switching, elevation, transfer charges, terminal delivery charges, icing, cost of grain and coal doors and other similar items accruing during Federal control; such absorbed charges shall be borne by paying carrier.
- (III) Modifications and Interpretations of General Order No. 11.
- (9) Paragraph (11) of General Order No. 11 prescribes certain forms to be used in preparing Audit Office settlement accounts. Until further ordered, carriers may use such prescribed forms or, they may use those now in use by them in settlement of interline freight accounts until such time as a more complete study is made of the forms which will later be prescribed.
- (10) Sub-paragraph (b), of Paragraph (8) of General Order No. 11, provides that: "Only the original and one copy of the waybill shall be made." This provision is hereby amended to the extent of permitting carriers taking such additional copies of waybills as may be necessary to maintain the integrity of the accounts. The first copy must be printed in the same form as the original, but may be on a lighter weight of paper. Any additional copies beyond the first be prepared on blank paper.
- (11) While Paragraph (8) of General Order No. 11 provides for a standard form of waybill, such order does not prohibit the continuation or adoption of a color scheme for waybills for specific or special traffic when such color scheme tends to expedite or protect the freight.
- (12) If, under prevailing practices, freights originating on or destined to points on switching or tap lines are waybilled from or to trunk line junctions or connections with such switching or tap lines and junction settlements are made at such points of connections, such practices, may, until further ordered, be continued.

W. G. McAdoo,  
Director General of Railroads.

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#### GENERAL ORDER NO. 22.

UNITED STATES RAILROAD ADMINISTRATION.

Office of the Director General,  
Washington, D. C.

April 22, 1918.

Mr. G. A. Tomlinson is hereby appointed General Manager of the New York Canal Section of the United States Railroad Administration

and as such will have charge of the construction and acquisition of equipment for use upon the New York State Barge Canal and, as an incident thereto, for use upon the waters connecting therewith, and will operate such equipment for the Director General of Railroads upon such canal and other waters.

He is hereby empowered to enter into contracts, either in his own name as such General Manager or in the name of the Director General of Railroads, for the construction, acquisition or chartering of such equipment, for the purchase of supplies needed in such operation and for the transportation of property upon such canal and other waters.

W. G. McAdoo,  
Director General of Railroads.

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GENERAL ORDER NO. 23.

UNITED STATES RAILROAD ADMINISTRATION.  
Office of the Director General,  
Washington, D. C.

May 2, 1918.

Each and every carrier subject to Federal control shall render a weekly cash report on Form T-5, as per copy herewith.

The first report shall be rendered as of May 4, 1918.

W. G. McAdoo,  
Director General of Railroads.

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GENERAL ORDER NO. 24.

UNITED STATES RAILROAD ADMINISTRATION.  
Office of the Director General,  
Washington, D. C.

May 16, 1918.

On April 30th a telegram was sent to carriers, instructing them not to renew any expiring fire insurance policies on property in Federal control, and not to take out any new fire insurance policies upon such property. It was provided that carriers might call attention to cases calling for exceptional treatment. A letter was sent to the carriers confirming this telegram, and the letter suggested care for fire prevention in terms similar to the last paragraph of this order.

It is desired to extend the instructions to other insurance than fire insurance, excepting only bonds or policies insuring fidelity of employees in handling funds.

Carriers, therefore, are now instructed not to renew any expiring insurance of any character, covering property in Federal control, or any liability in connection with the operation or use of any such property, or liability for property transported or stored by carriers under Federal control, and not to take out any new policies, or place any additional or new risks under existing policies, of such insurance, except that this order shall not relate to bonds or policies insuring the

fidelity of employes in handling funds. Such fidelity bonds or policies shall be continued, and proper provision made for any necessary changes, as heretofore. Carriers may present to the Director General any special circumstances which they believe call for exceptional treatment.

If the termination of insurance in accordance with this order results, as to any particular property, in the discontinuance by the Insurance Company of inspection or other measures for prevention of loss, it will be desirable to adopt proper substitute therefor, and the carrier shall make reasonable and proper temporary provision for such inspection or other preventive measures, reporting its action to this office.

W. G. McADOO,  
Director General of Railroads.

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GENERAL ORDER NO. 25.

UNITED STATES RAILROAD ADMINISTRATION.

Office of the Director General,  
Washington, D. C.

May 20, 1918.

Effective July 1, 1918, the collection of transportation charges, by carriers under Federal control, for services rendered, shall be on a cash basis, and, effective as of that date, credit accommodations then in existence which may be in conflict with the following regulations shall be cancelled.

- (1) Tickets shall be sold only for cash in advance of service. Baggage charges are subject to the same rule as tickets, except C. O. D. baggage, and storage charges, which must be paid in cash before delivery.
- (2) In cases where the enforcement of this rule, with respect to freight, will retard prompt forwarding or delivery of the freight or the prompt release of equipment or station facilities, carriers will be permitted to extend credit for a period of not exceeding forty-eight (48) hours after receipt for shipment of a consignment if it be prepaid, or after delivery at destination if it be a collect consignment, provided the consignor if it be a prepaid consignment, or the consignee if it be collect, file a surety bond either individual or corporate, in an amount satisfactory to the Treasurer of the carrier. The form of such bond shall be prescribed by the chief legal officer of the individual carrier, conditioned upon and providing for payment of all charges within forty-eight (48) hours after forwarding or delivery of the freight. Upon receipt and acceptance of such bond a carrier may accept and forward prepaid consignments or may deliver collect consignments in advance of payment of all charges thereon to the amount covered by the bond. Failure to pay such



charges within the time prescribed will automatically cancel such credit.

- (3) Treasurers of individual carriers are required to arrange and conduct all matters relating to such credits. They shall designate the amount, and accept or reject the surety offered. Bonds may be required and accepted for individual consignments or blanket bonds may be accepted from individual shippers or consignees to cover all of their consignments for a given period; the period of the credit in such cases shall, however, be limited to forty-eight (48) hours on each shipment as prescribed in the preceding paragraph.
- (4) In case of any question as to the accuracy of charges, bills must be paid as rendered and claims presented for alleged errors. This will not prevent adjustments by agents or obvious errors.
- (5) Freight consigned to "order" or to "order notify" shall be delivered only upon surrender to the agent of the carrier of the original bills of lading for such freight, and the payment of the freight charges thereon as herein provided. Provided, however, if such bill of lading be lost or delayed the freight may be delivered in advance of surrender of the bill of lading upon receipt by the carrier's agent of a certified check for an amount equal to one hundred and ten (110) per cent of the invoice, or upon receipt of a surety bond either individual or corporate, acceptable to the Treasurer of the carrier in an amount for twice the amount of the invoice.
- (6) The extension or creation of Local Collection Bureaus or agencies will be authorized by the Director of Public Service and Accounting, as and when such Bureaus may be found to be necessary or expedient.
- (7) Bonding or underwriting arrangements with respect to credits extended, now in effect by individual carriers, shall be discontinued as of July 1, 1918, or as soon thereafter as existing contracts are terminable.
- (8) Advice of the foregoing regulations shall be promptly given to all to whom credit accommodations are now given to the end that the regulations may be put into effect at the time specified with as little inconvenience as possible.
- (9) Payment of transportation charges by check will be considered as a payment in cash if the person, firm or company signing or endorsing it, is known to the agent to be fully reliable. Checks are not to be taken or cashed by agents under any circumstances, except for transportation charges.
- (10) Until otherwise ordered, the foregoing rules will not apply to transportation service rendered other Departments of the Federal Government.

W. G. McADOO,  
Director General of Railroads.

GENERAL ORDER NO. 25-A.

UNITED STATES RAILROAD ADMINISTRATION  
Office of the Director General.  
Washington

June 12, 1918.

The effective date of General Order No. 25, which provides for placing the collection of transportation charges on a cash basis on and after July 1, 1918, is hereby postponed to August 1, 1918.

The rules governing the collection of transportation charges prescribed in General Order No. 25 are hereby amended and will not apply to transportation service rendered to:

The various departments and bureaus of the United States Government,

The nations allied with the United States in war,  
The various states of the United States,  
The counties and municipalities of such states,  
The District of Columbia and Alaska,  
The American Red Cross.

W. G. McAdoo,  
Director General of Railroads.

GENERAL ORDER NO. 26

DIRECTOR GENERAL OF RAILROADS  
Interstate Commerce Building  
Washington

May 23, 1918.

Whereas the Act of Congress approved March 21, 1918, entitled An Act to Provide for the Operation of Transportation Systems While Under Federal Control, provides (Section 10) "That carriers while under Federal Control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act \* \* \* or with any order of the President. \* \* \* But no process, mesne or final, shall be levied against any property under such Federal control:" and authorizes the President to exercise any of the powers by said act or thereof granted him with relation to Federal control through such agencies as he might determine; and

Whereas by a proclamation dated March 29, the President, acting under the Federal control act and all other powers him thereto enabling, authorized the Director General, either personally or through such divisions, agencies, or persons, or in the name of the President, to issue any and all orders which may in any way be found necessary and expedient in connection with the Federal control of systems of transportation, railroads, and inland waterways as fully in all respects as the President is authorized to do, and generally to do and perform all and singular acts and things and to exercise all and singular the powers and duties which in and by the said act, or any other act in relation to the subject hereof, the President is authorized to do and perform; and

Whereas it appears that there are now pending against carriers under Federal control a great many suits for personal injury, freight and damage claims, and that the same are being pressed for trial by the plaintiffs in states and jurisdiction far removed from the place where the persons alleged to have been injured or damaged resided at the time of such injury or damage, or far remote from the place where the causes of action arose; the effect of such trials being that men operating the trains engaged in hauling war materials, troops, munitions or supplies, are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more; which practice is highly prejudicial to the just interests of the Government and seriously interferes with the physical operation of railroads; and the practice of trying such cases during Federal control in remote jurisdiction is not necessary for the protection of the rights or the just interests of plaintiffs;

It is therefore ordered, that upon a showing by the defendant carrier that the just interests of the Government would be prejudiced by a present trial of any suit against any carrier under Federal control which suit is not covered by General Order No. 18 and which is now pending in any county or district other than where the cause of action arose or other than in which the person alleged to have been injured or damaged at that time resided, the suit shall not be tried during the period of Federal control; Provided, if no suit on the same cause of action is now pending in the county or district where the cause of action arose, or where the person injured or damaged at that time resided, a new suit may, upon proper service, be instituted therein; and if such suit is now barred by the Statute of Limitations, or will be barred before October 1, 1918, then the stay directed by this order shall not apply unless the defendant carrier shall stipulate in open court to waive the defense of the statute of limitations in any such suit which may be brought before October 1, 1918.

This order is declared to be necessary in the present war emergency. In the event of unnecessary hardship in any case either party may apply to the Director General for relief, and he will make such order therein as the circumstances may require consistent with the public interest.

This order is not intended in any way to impair or affect General Order No. 18 as amended by General Order No. 18-A.

W. G. McAdoo,  
Director General of Railroads.

#### GENERAL ORDER NO. 27

UNITED STATES RAILROAD ADMINISTRATION,  
Office of Director General.

Washington, May 25, 1918.

#### PREAMBLE

In promulgating this order I wish to acknowledge the patriotic service so unselfishly rendered by the Railroad Wage Commission,

consisting of Messrs Franklin K. Lane, Charles C. McChord, J. Harry Covington, and William R. Willcox in connection with the important question of wages and hours of service of railroad employees which I referred to them by my general order No. 5, dated January 18, 1918.

This Commission took hold of the task with great energy and devotion and has dealt with the entire subject in a thoroughly sympathetic spirit.

Manifestly in a matter of such magnitude and complexity it is impossible to find any general basis or formula which would correct every inequality and give satisfaction to every interest involved. But the Commission has made an earnest effort to do justice to all concerned. I have felt obliged, however, to depart from its recommendations in some particulars.

With respect to hours of service the Commission says:

"Manifestly, therefore, at this time, when men must be constantly taken from the railroads, as from all other industries, to fill the growing needs of the Nation's Army, hours of labor can not be shortened and thereby a greater number of men be required for railroad work. The Nation can not, in good faith, call upon the farmers and the miners to work as never before and press themselves to unusual tasks, and at the same time so shorten the hours of railroad men as to call from farm and mine additional and unskilled men to run the railroads. While the Commission is strongly disposed to a standard day, in so far as the nature of the service will permit it, its firm judgment consequently is that the existing hours of service in effect on the railroads should be maintained for the period of the war.

"But with this we earnestly urge that a most exhaustive study be made of this matter of hours of service, not with a view to the adoption of some arbitrary and universal policy which shall have no regard to the kind of work done, or to the effect upon the railroad service, but with these very considerations in mind. And we have gone into this matter far enough to justify to ourselves the belief that by the steady application of such sympathetic consideration, the railroad service may be improved, and at the same time fuller opportunity be given for lifting a burden that falls disproportionately upon some of the less favored of the railroad workers."

The Commission also reached the conclusion that as to overtime "the existing rules and conditions of payment should not be disturbed during the period of the war." The Commission has pointed out that this is not the time for any experiments which might lessen the tons of freight hauled and the number of passengers carried when the urgent and serious necessities of the war compel sacrifices from all, and that the adoption of any plan which would prevent the Government from working its men as long as they have been in the habit of working under private employers would be to take advantage of the grave war necessities of the Government and to embarrass it in carrying forward essential operations of the war at a time when the need of service was never greater and the ability to call in outside men is seriously impaired.

There has never been a time when the public interest demanded more urgently the devotion and unselfish service of all classes of railroad employees. I agree with the Commission that it is not practicable at this time, when the war is calling upon every class of loyal citizens for service and sacrifices, to reduce the actual hours of labor to eight in every line of railroad work.

Nevertheless I am convinced that no further inquiry is needed to demonstrate that the principle of the basic eight-hour day is reasonable and just and that all further contentions about it should be set at rest by recognition of that principle as a part of this decision.

Recognition of the principle of the basic eight-hour day in railroad service is, therefore, hereby made.

The question arises as to what further steps can and ought justly to be taken to strengthen the application of that principle, and when. This question must be solved in the light of the varied conditions of railroad employment and will have to be studied in detail by the Board of Railroad Wages and Working Conditions herein and hereby created and in the light of what is reasonably practicable under war conditions.

No problems so vast and intricate as that of doing practical justice to the 2,000,000 railroad employees of the country can be regarded as completely settled and disposed of by any one decision or order; therefore the Board of Railroad Wages and Working Conditions is hereby established and will take up as presented any phases of the general problem relating to any class of employees or any part of a class of employees which may justly call for further consideration.

It is my earnest hope that railroad officials and railroad employees will realize that their relations under *Federal control* are not based upon the old conditions of private management. Dissensions and disappointments should be forgotten and all should now remember that they are not only serving their country in the operation of the railroads, but that upon the character, quality, and loyalty of that service depends in large measure our success in this war.

It is an inspiring task—this task of putting upon a more just and equitable basis the wages and working conditions of loyal workers in railroad service—and I confidently expect the patriotic support and assistance of every railroad official and every railroad employee in performing that task with credit to each other with honor to their country.

#### ORDER.

Respecting the wages, hours and other conditions of employment of the employees of the railroads hereinafter mentioned,

It is hereby ordered:

#### ARTICLE I.—RAILROADS AFFECTED.

This order shall apply to the employees of the following railroads:

- Alabama & Vicksburg Ry. Co.  
 Alabama Great Southern R. R. Co.  
 Ann Arbor R. R. Co.  
 Arizona & New Mexico Ry. Co.  
 Arizona Eastern R. R. Co.  
 Atchison, Topeka & Santa Fe Ry. Co.  
 Atlanta & West Point R. R. Co.  
 Atlanta, Birmingham & Atlantic Ry. Co.  
 Atlantic Coast Line R. R. Co.  
 Atlantic & St. Lawrence R. R. Co.  
 Atlantic City R. R. Co.  
 Baltimore & Ohio R. R. Co.  
 Bangor & Aroostook R. R. Co.  
 Bessemer & Lake Erie R. R. Co.  
 Boston & Maine R. R.  
 Buffalo & Susquehanna R. R. Corporation.  
 Buffalo, Rochester & Pittsburg Ry. Co.  
 Carolina, Clinchfield & Ohio Ry.  
 Central of Georgia Ry. Co.  
 Central New England Ry. Co.  
 Central R. R. Co. of New Jersey.  
 Central Vermont Ry. Co.  
 Charleston & Western Carolina Ry. Co.  
 Chesapeake & Ohio Ry. Co.  
 Chicago & Alton R. R. Co.  
 Chicago & Eastern Illinois R. R. Co.  
 Chicago & Erie R. R. Co.  
 Chicago & Northwestern Ry. Co.  
 Chicago, Burlington & Quincy R. R. Co.  
 Chicago Great Western R. R. Co.  
 Chicago, Detroit & Canada Grand Trunk Junction R. R. Co.  
 Chicago, Indianapolis & Louisville Ry. Co.  
 Chicago, Milwaukee & St. Paul Ry. Co.  
 Chicago, Peoria & St. Louis R. R. Co.  
 Chicago, Rock Island & Gulf Ry. Co.  
 Chicago, Rock Island & Pacific Ry. Co.  
 Chicago, St. Paul, Minneapolis & Omaha Ry. Co.  
 Chicago, Terre Haute & Southeastern Ry. Co.  
 Cincinnati, Indianapolis & Western R. R. Co.  
 Cincinnati, New Orleans & Texas Pacific Ry. Co.  
 Cincinnati Northern R. R. Co.  
 Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.  
 Coal & Coke Ry. Co.  
 Colorado & Southern Ry. Co.  
 Cumberland Valley R. R. Co.  
 Delaware & Hudson Co.  
 Delaware, Lackawanna & Western R. R. Co.  
 Denver & Rio Grande R. R. Co.  
 Detroit & Mackinac Ry. Co.  
 Detroit & Toledo Shore Line R. R. Co.  
 Detroit, Grand Haven & Milwaukee Ry. Co.  
 Detroit, Toledo & Ironton R. R. Co.  
 Duluth & Iron Range R. R. Co.  
 Duluth, Missabe & Northern Ry. Co.  
 Duluth, South Shore & Atlantic Ry. Co.  
 Elgin, Joliet & Eastern Ry. Co.  
 El Paso & Southwestern Co.  
 Erie R. R. Co.  
 Florida East Coast Ry. Co.  
 Fort Smith & Western R. R. Co.  
 Fort Worth & Denver City Ry. Co.  
 Fort Worth & Rio Grande Ry. Co.  
 Galveston, Harrisburg & San Antonio Ry. Co.  
 Georgia R. R. Lessee Organization.  
 Georgia Southern & Florida Ry. Co.  
 Grand Rapids & Indiana Ry. Co.  
 Grand Trunk Western Ry. Co.  
 Great Northern Ry. Co.  
 Gulf & Ship Island R. R. Co.  
 Gulf, Colorado & Santa Fe Ry. Co.  
 Gulf, Mobile & Northern R. R.  
 Hocking Valley Ry. Co.  
 Houston & Texas Central R. R. Co.  
 Houston East & West Texas R. R. Co.  
 Hudson & Manhattan R. R.  
 Illinois Central R. R. Co.  
 International & Great Northern Ry. Co.  
 Kanawha & Michigan Ry. Co.  
 Kansas City Southern Ry. Co.  
 Lake Erie & Western R. R. Co.  
 Lehigh & Hudson River Ry. Co.  
 Lehigh & New England R. R. Co.  
 Lehigh Valley R. R. Co.  
 Long Island R. R. Co.  
 Los Angeles & Salt Lake R. R. Co.  
 Louisiana & Arkansas Ry. Co.  
 Louisiana Ry. & Navigation Co.  
 Louisiana Western R. R. Co.  
 Louisville & Nashville R. R. Co.  
 Louisville, Henderson & St. Louis Ry. Co.

Maine Central R. R. Co.	Richmond, Fredericksburg, & Potomac R. R. Co.
Midland Valley R. R. Co.	Rutland R. R. Co.
Michigan Central R. R. Co.	Seaboard Air Line Ry. Co.
Minneapolis & St. Louis R. R. Co.	San Antonio & Aransas Pass Ry. Co.
Minneapolis, St. Paul & S. Ste. Maine Ry. Co.	Southern Pacific Co.
Missouri, Kansas & Texas Ry. Co.	Southern Ry. Co.
Missouri, Kansas & Texas Ry. Co. of Texas.	Southern Ry. Co. in Mississippi.
Missouri Pacific R. R. Co.	Spokane, International Ry. Co.
Mobile & Ohio R. R. Co.	Spokane, Portland & Seattle Ry. Co.
Monongahela Ry. Co.	Staten Island Rapid Transit Ry. Co.
Morgan's, Louisiana & Texas R. & S. S. Co.	St. Joseph & Grand Island Ry. Co.
Nashville, Chattanooga & St. Louis Ry.	St. Louis, Brownsville & Mexico Ry. Co.
New Orleans & Northeastern R. R. Co.	St. Louis, San Francisco & Texas St. Louis, San Francisco & Texas Ry. Co.
New Orleans, Texas & Mexico R. Co.	St. Louis Southwestern Ry. Co.
New York Central R. R. Co.	St. Louis Southwestern Ry. Co. of Texas.
New York, Chicago & St. Louis R. Co.	Tennessee Central R. R. Co.
New York, New Haven & Hartford R. R. Co.	Texarkana & Fort Smith Ry. Co.
New York, Ontario & Western Ry. Co.	Texas & New Orleans R. R. Co.
New York, Philadelphia & Norfolk R. R. Co.	Texas & Pacific Ry. Co.
New York, Susquehanna & Western R. R. Co.	Toledo & Ohio Central Ry. Co.
Norfolk & Western Ry. Co.	Toledo, Peoria & Western Ry. Co.
Norfolk Southern R. R. Co.	Toledo, St. Louis & Western R. R. Co.
Northern Pacific Ry. Co.	Ulster & Delaware R. R. Co.
Northwestern Pacific R. R. Co.	Union Pacific R. R. Co.
Oregon Short Line R. R. Co.	Utah Ry. Co.
Oregon-Washington R. R. & Navigation Co.	Vicksburg, Shreveport & Pacific Ry. Co.
Panhandle & Santa Fe Ry. Co.	Virginian Ry. Co.
Pennsylvania Co.	Wabash Ry. Co.
Pennsylvania R. R. Co.	Washington Southern Ry. Co.
Pere Marquette R. R. Co.	West Jersey & Seashore R. R. Co.
Philadelphia & Reading Ry. Co.	Western Maryland Ry. Co.
Philadelphia, Baltimore & Washington R. R. Co.	Western Pacific R. R. Co.
Pittsburgh & Lake Erie R. R. Co.	Western Ry. of Alabama.
Pittsburgh & Shawmut R. R. Co.	Wheeling & Lake Erie R. R. Co.
Pittsburgh & West Virginia Ry. Co.	Wichita Falls & Northwestern Ry. Co.
Pittsburgh, Cincinnati, Chicago & St. Louis R. R. Co.	Wichita Valley Ry. Co.
Port Reading R. R. Co.	Yazoo & Mississippi Valley R. R. Co.

And all terminal, union station, and switching companies, all or a majority of whose stock is owned by railroads named above.

Such other railroads as may be retained in Federal control on July 1, 1918, will be added to the foregoing list by order of the Director General.

The Pullman Company, whose status is now being considered, will also be added by order to the foregoing list, if decision shall be reached to retain it in Federal control.

## ARTICLE II.—RATES OF WAGES AND METHODS OF COMPUTATION.

Increases in wages, effective as hereinafter provided, January 1, 1918, are hereby established as follows:

*Section A.—Rates of Wages of Railroad Employees Paid upon a Monthly basis.*

1	2	3	4
To the monthly rate of pay of men receiving in December, 1915, the amounts named in this column.	Add the per cent named in this column	Equivalent to amount named in this column.	Making new rate per mo. as shown in this column.
Under \$46 (except as provided in par. 13, page 22) .....		\$20.00	.....
\$46.01 to \$47 .....	43	20.21	\$67.21
\$47.01 to \$48 .....	43	20.64	68.64
\$48.01 to \$49 .....	43	21.07	70.07
\$49.01 to \$50 .....	43	21.50	71.50
\$50.01 to \$51 .....	42.35	21.60	72.60
\$51.01 to \$52 .....	41.73	21.70	73.70
\$52.01 to \$53 .....	41	21.73	74.73
\$53.01 to \$54 .....	41	22.14	76.14
\$54.01 to \$55 .....	41	22.55	77.55
\$55.01 to \$56 .....	41	22.96	78.96
\$56.01 to \$57 .....	41	23.27	80.37
\$57.01 to \$58 .....	41	23.78	81.78
\$58.01 to \$59 .....	41	24.19	83.19
\$59.01 to \$60 .....	41	24.60	84.60
\$60.01 to \$61 .....	41	25.01	86.01
\$61.01 to \$62 .....	41	25.42	87.42
\$62.01 to \$63 .....	41	25.83	88.83
\$63.01 to \$64 .....	41	26.24	90.24
\$64.01 to \$65 .....	41	26.65	91.65
\$65.01 to \$66 .....	41	27.06	93.06
\$66.01 to \$67 .....	41	\$27.47	\$94.47
\$67.01 to \$68 .....	41	27.88	95.88
\$68.01 to \$69 .....	41	28.29	97.29
\$69.01 to \$70 .....	41	28.70	98.70
\$70.01 to \$71 .....	41	29.11	100.11
\$71.01 to \$72 .....	41	29.52	101.52
\$72.01 to \$73 .....	41	29.93	102.93
\$73.01 to \$74 .....	41	30.34	104.34
\$74.01 to \$75 .....	41	30.75	105.75
\$75.01 to \$76 .....	41	31.16	107.16
\$76.01 to \$77 .....	41	31.57	108.57
\$77.01 to \$78 .....	41	31.98	109.98
\$78.01 to \$79 .....	41	32.39	111.39
\$79.01 to \$80 .....	40.87	32.70	112.70
\$80.01 to \$81 .....	40.44	32.75	113.75
\$81.01 to \$82 .....	40	32.80	114.80
\$82.01 to \$83 .....	40	33.20	116.20
\$83.01 to \$84 .....	40	33.60	117.60
\$84.01 to \$85 .....	40	34.00	119.00

Columns 2 and 3 in the above table are explanatory of the method of arriving at the "new rates" included in column 4. The roads will substitute for the "old rates" of December, 1915, scheduled in column 1, the "new rates" listed in column 4.



# GENERAL ORDERS OF DIRECTOR GENERAL. 1715

## Section A.—Rates of Wages of Railroad Employees Paid upon a Monthly Basis—Continued.

1 To the monthly rate of pay of men receiving in December, 1915, the amounts named in this column.	2 Add the per cent named in this column	3 Equivalent to amount named in this column.	4 Making new rate per mo. as shown in this column.
\$85.01 to \$86 .....	39.36*	33.85	119.85
\$86.01 to \$87 .....	38.74	33.70	120.70
\$87.01 to \$88 .....	38.13	33.55	121.55
\$88.01 to \$89 .....	37.53	33.40	122.40
\$89.01 to \$90 .....	36.95	33.25	123.25
\$90.01 to \$91 .....	36.38	33.10	124.10
\$91.01 to \$92 .....	35.82	32.95	124.95
\$92.01 to \$93 .....	35.27	32.80	125.80
\$93.01 to \$94 .....	34.74	32.65	126.65
\$94.01 to \$95 .....	34.22	32.50	127.50
\$95.01 to \$96 .....	33.70	32.35	128.35
\$96.01 to \$97 .....	33.20	32.20	129.20
\$97.01 to \$98 .....	32.71	32.05	130.05
\$98.01 to \$99 .....	32.23	31.90	130.90
\$99.01 to \$100 .....	31.75	31.75	131.75
\$100.01 to \$101 .....	31.29	31.60	132.60
\$101.01 to \$102 .....	30.84	31.45	133.45
\$102.01 to \$103 .....	30.39	31.30	134.30
\$103.01 to \$104 .....	29.96	31.15	135.15
\$104.01 to \$105 .....	29.53	31.00	136.00
\$105.01 to \$106 .....	29.11	30.85	136.85
\$106.01 to \$107 .....	28.70	30.70	137.70
\$107.01 to \$108 .....	28.29	30.55	138.55
\$108.01 to \$109 .....	27.89	30.40	139.40
\$109.01 to \$110 .....	27.50	30.25	140.25
\$110.01 to \$111 .....	27.12	30.10	141.10
\$111.01 to \$112 .....	26.74	29.95	141.95
\$112.01 to \$113 .....	26.38	29.80	142.80
\$113.01 to \$114 .....	26.01	29.65	143.65
\$114.01 to \$115 .....	25.66	29.50	144.50
\$115.01 to \$116 .....	25.31	29.35	145.35
\$116.01 to \$117 .....	24.96	29.20	146.20
\$117.01 to \$118 .....	24.62	29.05	147.05
\$118.01 to \$119 .....	24.29	28.90	147.90
\$119.01 to \$120 .....	23.96	28.75	148.75
\$120.01 to \$121 .....	23.64	28.60	149.60
\$121.01 to \$122 .....	23.32	28.45	150.45
\$122.01 to \$123 .....	23.01	28.30	151.30
\$123.01 to \$124 .....	22.70	28.15	152.15
\$124.01 to \$125 .....	22.40	28.00	153.00
\$125.01 to \$126 .....	22.11	27.85	153.85
\$126.01 to \$127 .....	21.81	27.70	154.70
\$127.01 to \$128 .....	21.53	27.55	155.55
\$128.01 to \$129 .....	21.24	27.40	156.40
\$129.01 to \$130 .....	20.96	27.25	157.25
\$130.01 to \$131 .....	20.69	27.10	158.10
\$131.01 to \$132 .....	20.42	26.95	158.95
\$132.01 to \$133 .....	20.15	26.80	159.80

Columns 2 and 3 in the above table are explanatory of the method of arriving at the "new rates" included in column 4. The roads will substitute for the "old rates" of December, 1915, scheduled in column 1, the "new rates" listed in column 4.

*Section A.—Rates of Wages of Railroad Employees Paid upon a Monthly Basis—Continued.*

1	2	3	4
To the monthly rate of pay of men receiving in December, 1915, the amounts named in this column.	Add the per cent named in this column	Equivalent to amount named in this column.	Making new rate per mo. as shown in this column.
\$133.01 to \$134 .....	19.89	26.65	160.65
\$134.01 to \$135 .....	19.63	26.50	161.50
\$135.01 to \$136 .....	19.38	26.35	162.35
\$136.01 to \$137 .....	19.13	26.20	163.20
\$137.01 to \$138 .....	18.88	26.05	164.05
\$138.01 to \$139 .....	18.64	25.90	164.90
\$139.01 to \$140 .....	18.39	25.75	165.75
\$140.01 to \$141 .....	18.16	25.60	166.60
\$141.01 to \$142 .....	17.92	25.45	167.45
\$142.01 to \$143 .....	17.69	25.30	168.30
\$143.01 to \$144 .....	17.47	25.15	169.15
\$144.01 to \$145 .....	17.24	25.00	170.00
\$145.01 to \$146 .....	17.02	24.85	170.85
\$146.01 to \$147 .....	16.80	24.70	171.70
\$147.01 to \$148 .....	16.59	24.55	172.55
\$148.01 to \$149 .....	16.38	24.40	173.40
\$149.01 to \$150 .....	16.17	24.25	174.25
\$150.01 to \$151 .....	15.96	24.10	175.10
\$151.01 to \$152 .....	15.76	23.95	175.95
\$152.01 to \$153 .....	15.56	23.80	176.80
\$153.01 to \$154 .....	15.36	23.65	177.65
\$154.01 to \$155 .....	15.16	23.50	178.50
\$155.01 to \$156 .....	14.97	23.35	179.35
\$156.01 to \$157 .....	14.78	23.20	180.20
\$157.01 to \$158 .....	14.59	23.05	181.05
\$158.01 to \$159 .....	14.40	22.90	181.90
\$159.01 to \$160 .....	14.22	22.75	182.75
\$160.01 to \$161 .....	14.04	22.60	183.60
\$161.01 to \$162 .....	13.86	22.45	184.45
\$162.01 to \$163 .....	13.68	22.30	185.30
\$163.01 to \$164 .....	13.51	22.15	186.15
\$164.01 to \$165 .....	13.33	22.00	187.00
\$165.01 to \$166 .....	13.16	21.85	187.85
\$166.01 to \$167 .....	13.00	21.70	188.70
\$167.01 to \$168 .....	12.83	21.55	189.55
\$168.01 to \$169 .....	12.66	21.40	190.40
\$169.01 to \$170 .....	12.50	21.25	191.25
\$170.01 to \$171 .....	12.34	21.10	192.10
\$171.01 to \$172 .....	12.18	20.95	192.95
\$172.01 to \$173 .....	12.02	20.80	193.80
\$173.01 to \$174 .....	11.87	20.65	194.65
\$174.01 to \$175 .....	11.71	\$20.50	\$195.50
\$175.01 to \$176 .....	11.56	20.35	196.35
\$176.01 to \$177 .....	11.41	20.20	197.20
\$177.01 to \$178 .....	11.26	20.05	198.05
\$178.01 to \$179 .....	11.12	19.90	198.90
\$179.01 to \$180 .....	10.97	19.75	199.75
\$180.01 to \$181 .....	10.83	19.60	200.60
\$181.01 to \$182 .....	10.69	19.45	201.45

Columns 2 and 3 in the above table are explanatory of the method of arriving at the "new rates" included in column 4. The roads will substitute for the "old rates" of December, 1915, scheduled in column 1, the "new rates" listed in column 4.

*Section A.—Rates of Wages of Railroad Employees Paid upon a Monthly Basis—Continued.*

1 To the monthly rate of pay of men receiving in December, 1915, the amounts named in this column.	2 Add the per cent named in this column	3 Equivalent to amount named in this column.	4 Making new rate per mo. as shown in this column.
\$182.01 to \$183 .....	10.55	19.30	202.30
\$183.01 to \$184 .....	10.41	19.15	203.15
\$184.01 to \$185 .....	10.27	19.00	204.00
\$185.01 to \$186 .....	10.14	18.85	204.85
\$186.01 to \$187 .....	10.00	18.70	205.70
\$187.01 to \$188 .....	9.87	18.55	206.55
\$188.01 to \$189 .....	9.74	18.40	207.40
\$189.01 to \$190 .....	9.61	18.25	208.25
\$190.01 to \$191 .....	9.48	18.10	209.10
\$191.01 to \$192 .....	9.35	17.95	209.95
\$192.01 to \$193 .....	9.22	17.80	210.80
\$193.01 to \$194 .....	9.10	17.65	211.65
\$194.01 to \$195 .....	8.97	17.50	212.50
\$195.01 to \$196 .....	8.85	17.35	213.35
\$196.01 to \$197 .....	8.73	17.20	214.20
\$197.01 to \$198 .....	8.61	17.05	215.05
\$198.01 to \$199 .....	8.49	16.90	215.90
\$199.01 to \$200 .....	8.375	16.75	216.75
\$200.01 to \$201 .....	8.26	16.60	217.60
\$201.01 to \$202 .....	8.14	16.45	218.45
\$202.01 to \$203 .....	8.03	16.30	219.30
\$203.01 to \$204 .....	7.92	16.15	220.15
\$204.01 to \$205 .....	7.80	16.00	221.00
\$205.01 to \$206 .....	7.69	15.85	221.85
\$206.01 to \$207 .....	7.58	15.70	222.70
\$207.01 to \$208 .....	7.48	15.55	223.55
\$208.01 to \$209 .....	7.37	15.40	224.40
\$209.01 to \$210 .....	7.26	15.25	225.25
\$210.01 to \$211 .....	7.16	15.10	226.10
\$211.01 to \$212 .....	7.05	14.95	226.95
\$212.01 to \$213 .....	6.95	14.80	227.80
\$213.01 to \$214 .....	6.85	14.65	228.65
\$214.01 to \$215 .....	6.74	14.50	229.50
\$215.01 to \$216 .....	6.64	14.35	230.35
\$216.01 to \$217 .....	6.54	14.20	231.20
\$217.01 to \$218 .....	6.445	14.05	232.05
\$218.01 to \$219 .....	6.35	13.90	232.90
\$219.01 to \$220 .....	6.25	13.75	233.75
\$220.01 to \$221 .....	6.15	13.60	234.60
\$221.01 to \$222 .....	6.06	13.45	235.45
\$222.01 to \$223 .....	5.96	13.30	236.30
\$223.01 to \$224 .....	5.87	13.15	237.15
\$224.01 to \$225 .....	5.78	13.00	238.00
\$225.01 to \$226 .....	5.69	12.85	238.85
\$226.01 to \$227 .....	5.595	12.70	239.70
\$227.01 to \$228 .....	5.50	12.55	240.55

Columns 2 and 3 in the above table are explanatory of the method of arriving at the "new rates" included in column 4. The roads will substitute for the "old rates" of December, 1915, scheduled in column 1, the "new rates" listed in column 4.

*Section A.—Rates of Wages of Railroad Employees Paid upon a Monthly Basis—Continued.*

1 To the monthly rate of pay of men receiving in December, 1915, the amounts named in this column.	2 Add the per cent named in this column	3 Equivalent to amount named in this column.	4 Making new rate per mo. as shown in this column.
\$228.01 to \$229 .....	5.415	\$12.40	\$241.40
\$229.01 to \$230 .....	5.33	12.25	242.25
\$230.01 to \$231 .....	5.24	12.10	243.10
\$231.01 to \$232 .....	5.15	11.95	243.95
\$232.01 to \$233 .....	5.065	11.80	244.80
\$233.01 to \$234 .....	4.98	11.65	245.65
\$234.01 to \$235 .....	4.89	11.50	246.50
\$235.01 to \$236 .....	4.81	11.35	247.35
\$236.01 to \$237 .....	4.73	11.20	248.20
\$237.01 to \$238 .....	4.64	11.05	249.05
\$238.01 to \$239 .....	4.56	10.90	249.90
\$238.01 to \$240 .....		10.00	250.00
\$240.01 to \$241 .....		9.00	250.00
\$241.01 to \$242 .....		8.00	250.00
\$242.01 to \$243 .....		7.00	250.00
\$243.01 to \$244 .....		6.00	250.00
\$244.01 to \$245 .....		5.00	250.00
\$245.01 to \$246 .....		4.00	250.00
\$246.01 to \$247 .....		3.00	250.00
\$247.01 to \$248 .....		2.00	250.00
\$248.01 to \$249 .....		1.00	250.00
\$249.01 to \$250 .....		.00	250.00

Columns 2 and 3 in the above table are explanatory of the method of arriving at the "new rates" included in column 4. The roads will substitute for the "old rates" of December, 1915, scheduled in column 1, the "new rates" listed in column 4.

**METHOD OF APPLYING INCREASES TO MONTHLY RATES.**

(1) The employee who holds the same position to day that he did the last day of December, 1915, and who then received \$75 a month and has received no increase since, will receive an additional wage of \$30.75 per month. If he has received an increase in these two years of \$10 per month, the recommended increase of his wage will be cut down by that much, making his net advance \$20.75.

(2) Employee "A" occupied the same position in 1915 and in 1918: Salary, 1915, \$150 per month; 1918, \$175 per month.

Basis of increase on salaries of \$150 per month is 16.17 per cent, or \$24.25 per month. New salary, \$174.25: present salary, \$175. Present salary undisturbed.

(3) Employee "B" in 1915 received \$100, and on the same desk in 1918 received \$112.50 per month. Basis of increase on \$100, 31.75 per cent, or \$31.75. New salary, \$131.75. Present salary, \$112.50. Employee "B" is entitled to receive back pay from January 1, at the rate of \$19.25 (the difference between \$131.75 and \$112.50), and to receive monthly, hereafter, \$131.75 instead of \$112.50. Back pay due January 1 to May 31, \$96.25.

(4) Employee in December, 1915, received \$100 per month, entitles him, with this increase, to \$131.75. His salary had been raised for same position on January 1, 1918, to \$135. He is not, therefore, entitled to any advance or back pay. Present salary undisturbed.

*Section B.—Rates of Wages of Railroad Employees Paid upon Daily Basis.*

Old rate per day.	New rate per day.	Old rate per day.	New rate per day.	Old rate per day.	New rate per day.	Old rate per day.	New rate per day.
\$0.75	\$1.52	\$2.50	\$3.53	\$4.25	\$5.40	\$5.95	\$6.85
.80	1.57	2.55	3.60	4.30	5.45	6.00	6.90
.85	1.62	2.60	3.67	4.35	5.49	6.05	6.94
.90	1.67	2.65	3.74	4.40	5.53	6.10	6.98
.95	1.72	2.70	3.81	4.45	5.58	6.15	7.02
1.00	1.77	2.75	3.88	4.50	5.62	6.20	7.06
1.05	1.82	2.80	3.95	4.55	5.66	6.25	7.11
1.10	1.87	2.85	4.02	4.60	5.71	6.30	7.15
1.15	1.92	2.90	4.09	4.65	5.75	6.35	7.19
1.20	1.97	2.95	4.16	4.70	5.79	6.40	7.23
1.25	2.02	3.00	4.23	4.75	5.83	6.45	7.28
1.30	2.07	3.05	4.30	4.80	5.88	6.50	7.32
1.35	2.12	3.10	4.36	4.85	5.92	6.55	7.36
1.40	2.17	3.15	4.41	4.90	5.96	6.60	7.41
1.45	2.22	3.20	4.48	4.95	6.00	6.65	7.45
1.50	2.27	3.25	4.55	5.00	6.05	6.70	7.49
1.55	2.32	3.30	4.60	5.05	6.09	6.75	7.53
1.60	2.37	3.35	4.65	5.10	6.13	6.80	7.58
1.65	2.42	3.40	4.70	5.15	6.17	6.85	7.62
1.70	2.47	3.45	4.72	5.20	6.21	6.90	7.66
1.75	2.52	3.50	4.77	5.25	6.26	6.95	7.70
1.80	2.57	3.55	4.81	5.30	6.30	7.00	7.75
1.85	2.65	3.60	4.85	5.35	6.34	7.05	7.79
1.90	2.72	3.65	4.90	5.40	6.38	7.10	7.83
1.95	2.77	3.70	4.94	5.45	6.43	7.15	7.88
2.00	2.83	3.75	4.98	5.50	6.47	7.20	7.91
2.05	2.89	3.80	5.03	5.55	6.51	7.25	7.96
2.10	2.96	3.85	5.07	5.60	6.55	7.30	8.00
2.15	3.03	3.90	5.11	5.65	6.60	7.35	8.04
2.20	3.10	3.95	5.15	5.70	6.64	7.40	8.08
2.25	3.17	4.00	5.20	5.75	6.68	7.45	8.13
2.30	3.24	4.05	5.24	5.80	6.73	7.50	8.17
2.35	3.31	4.10	5.28	5.85	6.77	7.55	8.21
2.40	3.38	4.15	5.32	5.90	6.81	7.60	8.25
2.45	3.45	4.20	5.36				

"Old rates" are those of December, 1915.

For common labor paid by the day, the scale of new rates per day shown shall apply, with the provision, however, that as a minimum 20 cents per 8-hour day, 22½ cents per 9-hour day, 25 cents per 10-hour day, 27½ cents per 11-hour day, and 30 cents per 12-hour day will be added to the rates paid per day as of December 31, 1917.

## METHOD OF APPLYING INCREASES TO DAILY RATES.

(1) Employee, December, 1915, \$3.00:

Increased to new rate of \$4.23 per day ..... \$109.98  
 Jan. 1, 1918, his pay was raised for same work to \$3.50  
 per day, equal per month to ..... 91.00

Difference in pay:

1 month ..... 18.98

5 months ..... 94.90

An 8-hour 26-day month both years.

Worked 62 hours overtime, at new 1918 rate.

52.9¢ \$32.80 .....

Was paid 62 hours overtime at ..... 37.5¢ 23.25 9.55

Total back pay due Jan. 1 to May 31, 1918 ..... 104.45

(2) Employee "C" was employed in 1918, but not in 1915. Rate of pay on the district where he is employed in 1918, in 1915 was \$1.10 per day. The 1918 rate of pay is, on the same district, \$1.50 per day. The new rate is \$1.87 per day. He will, therefore, be entitled to receive from January 1, 1918, to May 31, 1918, 37 cents per day additional for each day he worked in that period.

*Section C.—Rates of Wages of Railroad Employees Paid upon Hourly Basis.*

[Rates of pay in cents per hour.]

Old rate per hour. <sup>1</sup>	New rate per hour.	Old rate per hour. <sup>1</sup>	New rate per hour.	Old rate per hour. <sup>1</sup>	New rate per hour.	Old rate per hour. <sup>1</sup>	New rate per hour.
10	19.75	38	53.75	66	78.50	94	102.50
10.5	20.25	38.5	54.25	66.5	79.00	94.5	102.75
11	20.75	39	54.75	67	79.50	95	103.25
11.5	21.25	39.5	55.50	67.5	79.75	95.5	103.75
12	21.75	40	56.00	68	80.25	96	104.25
12.5	22.25	40.5	56.75	68.5	80.75	96.5	104.50
13	22.75	41	57.25	69	81.25	97	105.00
13.5	23.25	41.5	57.75	69.5	81.50	97.5	105.50
14	23.75	42	58.25	70	82.00	98	106.00
14.5	24.25	42.5	58.50	70.5	82.50	98.5	106.25
15	24.75	43	59.00	71	83.00	99	106.75
15.5	25.25	43.5	59.50	71.5	83.25	99.5	107.25
16	25.75	44	60.00	72	83.75	100	107.50
16.5	26.25	44.5	60.25	72.5	84.25	100.5	108.00
17	26.75	45	60.75	73	84.50	101	108.25
17.5	27.25	45.5	61.25	73.5	85.00	101.5	108.75
18	27.75	46	61.50	74	85.50	102	109.25
18.5	28.25	46.5	62.00	74.5	86.00	102.5	109.75
19	28.75	47	62.50	75	86.25	103	110.00
19.5	29.25	47.5	63.00	75.5	86.75	103.5	110.50
20	29.75	48	63.25	76	87.00	104	111.00
20.5	30.25	48.5	63.75	76.5	87.50	104.5	111.25
21	30.75	49	64.25	77	88.00	105	111.75
21.5	31.25	49.5	64.75	77.5	88.25	105.5	112.25
22	31.75	50	65.00	78	88.75	106	112.75
22.5	32.25	50.5	65.25	78.5	89.25	106.5	113.00

*Section C.—Rates of Wages of Railroad Employees Paid upon Hourly Basis.—Continued.*

[Rates of pay in cents per hour.]

Old rate per hour. <sup>1</sup>	New rate per hour.	Old rate per hour. <sup>1</sup>	New rate per hour.	Old rate per hour. <sup>1</sup>	New rate per hour.	Old rate per hour. <sup>1</sup>	New rate per hour.
23	33.00	51	65.75	79	89.75	107	113.50
23.5	33.75	51.5	66.25	79.5	90.00	107.5	114.00
24	34.50	52	66.50	80	90.50	108	114.25
24.5	35.00	52.5	67.00	80.5	91.00	108.5	114.75
25	35.50	53	67.50	81	91.50	109	115.25
25.5	36.00	53.5	68.00	81.5	91.75	109.5	115.75
26	36.75	54	68.25	82	92.25	110	116.00
26.5	37.50	54.5	68.75	82.5	92.75	110.5	116.50
27	38.25	55	69.25	83	93.00	111	117.00
27.5	39.00	55.5	69.75	83.5	93.50	111.5	117.25
28	39.50	56	70.00	84	94.00	112	117.75
28.5	40.25	56.5	70.50	84.5	94.50	112.5	118.25
29	41.00	57	71.00	85	94.75	113	118.50
29.5	41.75	57.5	71.50	85.5	95.25	113.5	119.00
30	42.50	58	71.75	86	95.75	114	119.50
30.5	43.00	58.5	72.25	86.5	96.00	114.5	119.75
31	43.75	59	72.75	87	96.50	115	120.00
31.5	44.50	59.5	73.00	87.5	97.00	115.5	120.00
32	45.25	60	73.50	88	97.25	116	120.00
32.5	46.00	60.5	74.00	88.5	97.75	116.5	120.00
33	46.75	61	74.50	89	98.25	117	120.00
33.5	47.25	61.5	74.75	89.5	98.50	117.5	120.00
34	48.00	62	75.25	90	99.00	118	120.00
34.5	48.75	62.5	75.75	90.5	99.50	118.5	120.00
35	49.50	63	76.00	91	99.75	119	120.00
35.5	50.25	63.5	76.50	91.5	100.25	119.5	120.00
36	51.00	64	76.75	92	100.75	120	120.00
36.5	51.50	64.5	77.25	92.5	101.25		
37	52.25	65	77.75	93	101.50		
37.5	53.00	65.5	78.25	93.5	102.00		

<sup>1</sup> "Old rates" are those of December, 1915.

While it is expected that the Board of Railroad Wages and Working Conditions hereinafter created shall give consideration to all questions of inequality as between individuals and classes of employees throughout, sufficient information is available to justify certain conclusions with respect to the mechanical crafts, and in the case of machinists, boilermakers, blacksmiths, and other shop mechanics who have been receiving the same hourly rates, the increase named in this Order shall apply, with a minimum wage of 55 cents per hour.

It is recognized that this may still leave among shop employees certain inequalities as to individual employees, to which the Board of Railroad Wages and Working Conditions will give prompt consideration.

For common labor paid by the hour, the scale named herein shall apply, with the provision, however, that as a minimum, 2½ cents per hour will be added to the rates paid per hour, as of December 31, 1917.

## METHOD OF APPLYING INCREASES TO HOURLY RATES.

(1) Machinist worked in January, 1918, 8 hours per day, 27 days, total 216 hours straight time.

The rate of pay for this position in December, 1915, was 34 cents per hour; new rate under this order 48 cents per hour, but with minimum rate of 55 cents per hour as herein ordered, will receive .. \$118.80  
 In January, 1918, his rate of pay was 37½ cents per hour, for 216 hours, equals ..... 81.00

Difference one month ..... 37.80

On basis of working same amount straight time each month for five months (January 1 to May 31) .. 189.00

Also worked in same period 90 hours overtime at time and one-half, new 55 cents minimum rate, or 82½ cents, equals ..... \$74.25  
 Was paid 56¼cents (time and one-half) ..... 50.63

23.62

Balance due January 1 to May 31, 1918 ..... 212.62

(2) Machinist worked in January, 1918, 10 hours per day, 26 days, total 260 hours straight time.

The rate of pay for this position in 1915 was 34 cents per hour; new rate under this order, 48 cents per hour, but with minimum rate of 55 cents per hour as herein ordered will receive ..... \$143.00  
 In January, 1918, his rate of pay was 37½ cents per hour; 260 hours equals ..... 97.50

Difference 1 month ..... 45.50

On basis of working same amount of straight time each month for 5 months (Jan. 1 to May 31) .... 227.50

Also worked in same period 90 hours overtime at pro rata, new 55-cent minimum rate equals ..... \$49.50

Was paid at 37½-cent rate pro rata overtime or ..... 33.75

15.75

Balance due Jan. 1 to May 31, 1918 ..... 243.25

(3) Machinist "D" was employed in the same shop in December, 1915, and in 1918 on the same class of work. His hourly rate in December, 1915, was 35 cents for 9 hours, 26 days a month. He was paid for overtime and Sunday work at time and one-half. On January 1, 1918, his hours were reduced to 8 and his rate increased to 40 cents. The new hourly rate applicable to his 1915 rate, viz: 49½cents being less than the minimum of 55 cents, his new rate will be 55 cents per hour. In 1918, from January to May 31, he worked 234 hours per month or an average of one hour overtime daily on the 1918 schedule. This for five months gives him 130 hours overtime. He has been paid as follows:



1,040 hours straight time, at 40 cents .....	\$416.00
130 hours overtime, at 60 cents .....	78.00

Total .....	494.00
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His back pay will be computed as follows:

1,040 hours straight time, at 55 cents .....	572.00
130 hours overtime, at 82½ cents .....	107.25

Total .....	679.25
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Deduct payment at 1918 rates .....	494.00
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Back pay due .....	185.25
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and his future rate per hour will be 55 cents.

(4) In the case of employee "E," who was employed in a shop where the rate for his position was 35 cents per hour for 8 hours' work in 1915, with time and one-half for overtime, but in the same position and same shop with the same hours in 1918 his rate is 45 cents per hour; his earnings in 1915 in the standard 208-hour month would be \$72.80 per month, and he would be entitled to the new hourly rate of 49½ cents per hour. His straight time and overtime earnings and back pay would be computed in exactly the same manner as machinist "D." The principles illustrated will apply to all men paid by the hour, whatever their occupation may be.

*Section D.—Rates of Wages of Railroad Employees Paid upon Piece-work Basis.*

METHOD OF APPLYING INCREASES TO PIECE RATES.

(1) The pieceworker shall receive for each hour worked, the same increase per hour as is awarded to the hourly worker engaged in similar employment in the same shop.

(2) If the hourly rate has been increased since 1915 to an amount greater than the increase herein fixed, then the higher rate shall prevail.

(3) Where there was no piece rate for an item or operation in the piece-rate schedule of 1915, adjust the current price by such an amount as similar item or operation has been increased or decreased since December 31, 1915, or as near such a plan as practicable.

(4) It is understood that the application of this order shall not, in any case, operate to reduce current earnings.

(5) When a pieceworker works overtime or undertime, he shall receive that proportion of the increase provided in the schedule which the time actually worked bears to the normal time in the position.

(6) Overtime is not to be considered solely as the number of hours employed in excess of the normal hours per month in the position, but rather the time employed in excess of the normal hours per day.

(7) Employee "F" was employed under a piecework schedule in a shop where the basic hourly rate was 35 cents for eight hours, with time and one-half overtime. This rate under the plan illustrated above will be increased to 49½ cents per hour. Difference, 14½ cents.

Regardless of the schedule of piece rates under which he is paid, under this order "F" will be entitled to receive  $14\frac{1}{2}$  cents per hour in addition to his piecework earnings for every hour worked in 1918 unless the hourly rate shall in the interim have been raised and a proportionate increase made in the piecework schedule.

For example: Assume that "F" made \$90 in December, 1915, at his piecework. At the hourly rate he would have earned only \$72.80, and his hourly rate must therefore be increased to  $49\frac{1}{2}$  cents.

If, in January, 1918, he has attained sufficient skill to earn \$100 on the same piecework schedule, he will be entitled to receive, nevertheless,  $14\frac{1}{2}$  cents per hour for each hour of straight time worked, and for each hour of overtime,  $21\frac{3}{4}$  cents additional (if time and one-half for overtime is in effect).

Assume that in the five months, January 1 to May 31, "F" has worked 1,040 hours straight time, and 130 hours overtime, and has, at his piece-work schedule earned \$500. He will be entitled, nevertheless, to receive as back pay, the following amount:

1,040 hours at $14\frac{1}{2}$ cents per hour .....	\$150.80
130 hours at $21\frac{3}{4}$ cents per hour .....	28.28
	<hr/>
	179.08

But if in January, 1918, the basic hourly rate had been increased to 50 cents, and this increase had been correspondingly expressed in his piecework schedule, he would be entitled to no back pay. If, on the other hand, the hourly rate had been increased from 35 cents in 1915 to 45 on January 1, 1918, and this increase had been expressed in a corresponding increase in the piece-work schedule, then "F" would be entitled to receive back pay at  $4\frac{1}{2}$  cents per hour for straight time and  $6\frac{3}{4}$  cents per hour overtime.

If the practice in the shop, however, had been to pay pro rata for overtime, then the rate for such overtime since January 1, 1918, would be pro rata at  $4\frac{1}{2}$  cents, or  $14\frac{1}{2}$  cents per hour, according to whether piece rates had been or had not been increased.

(8) Employee's December, 1915, rate was  $38\frac{1}{2}$  cents; which rate in this order for 8 hours per day entitles him to  $54\frac{1}{4}$  cents per hour. His basic rate had, by January 1, 1918, been raised to  $42\frac{1}{2}$  cents per hour. Piece work rates had not been raised in the interval. This man earned in 208 hours \$100. He is entitled to a raise of  $11\frac{3}{4}$  cents per

$11\frac{3}{4}$  cents X 208:

1 month .....	\$24.44
5 months .....	122.20

*Section E.—Rates of Wages of Railroad Employees Paid upon Mileage Basis.*

The following rates will apply "per day" or its established equivalent in "miles":

Passenger engineers.		Passenger engineers.		Passenger engineers.		Passenger engineers.	
Old.	New.	Old.	New.	Old.	New.	Old.	New.
\$4.10	\$4.56	\$4.53	\$5.04	\$4.95	\$5.51	\$5.55	\$6.17
4.15	4.62	4.55	5.06	5.00	5.56	5.65	6.29
4.20	4.67	4.60	5.12	5.05	5.62	5.90	6.56
4.25	4.73	4.65	5.17	5.13	5.71	6.00	6.68
4.30	4.78	4.70	5.23	5.15	5.73	6.05	6.73
4.35	4.84	4.75	5.28	5.28	5.87	6.25	6.95
4.40	4.90	4.78	5.32	5.35	5.95	6.30	7.01
4.45	4.95	4.80	5.34	5.40	6.01	6.50	7.23
4.50	5.01	4.90	5.45	5.53	6.15	7.00	7.79

Passenger firemen.		Passenger firemen.		Passenger firemen.		Passenger firemen.	
Old.	New.	Old.	New.	Old.	New.	Old.	New.
\$1.91	\$2.46	\$2.60	\$3.35	\$2.84	\$3.66	\$3.30	\$4.25
2.25	2.90	2.62	3.37	2.85	3.67	3.35	4.31
2.33	3.00	2.65	3.41	2.90	3.73	3.40	4.38
2.34	3.01	2.69	3.46	2.95	3.80	3.45	4.44
2.40	3.09	2.70	3.48	3.00	3.86	3.60	4.64
2.42	3.12	2.75	3.54	3.05	3.93	3.75	4.83
2.45	3.15	2.76	3.55	3.10	3.99	4.00	5.15
2.50	3.22	2.78	3.58	3.15	4.06	4.15	5.34
2.51	3.23	2.80	3.61	3.20	4.12	4.25	5.47
2.55	3.28						

Passenger conductors.		Passenger conductors.		Passenger conductors.		Passenger conductors.	
Old.	New.	Old.	New.	Old.	New.	Old.	New.
\$2.50	\$2.89	\$2.68	\$3.10	\$2.90	\$3.35	\$3.47	\$4.01
2.60	3.00	2.75	3.18				

Passenger baggagemen.		Passenger baggagemen.		Passenger baggagemen.		Passenger baggagemen.	
Old.	New.	Old.	New.	Old.	New.	Old.	New.
\$1.40	\$1.94	1.49	\$2.06	\$1.61	\$2.23	\$1.70	\$2.35
1.45	2.00	1.54	2.13	1.65	2.28	2.00	2.77

Passenger trainmen.		Passenger trainmen.		Passenger trainmen.		Passenger trainmen.	
Old.	New.	Old.	New.	Old.	New.	Old.	New.
\$1.35	\$1.88	\$1.47	\$2.05	\$1.50	\$2.09	\$1.60	\$2.23
1.43	1.99	1.49	2.08	1.55	2.16	1.87	2.61
1.46	2.04						

Freight engineers.		Freight engineers.		Freight engineers.		Freight engineers.	
Old.	New.	Old.	New.	Old.	New.	Old.	New.
\$4.25	\$4.91	\$5.05	\$5.83	\$5.40	\$6.24	\$5.90	\$6.81
4.50	5.20	5.06	5.84	5.43	6.27	5.95	6.87
5.70	5.43	5.10	5.89	5.45	6.29	5.995	6.925
4.75	5.49	5.13	5.93	5.50	6.35	6.00	6.93
4.80	5.54	5.145	5.95	5.55	6.41	6.10	7.05
4.85	5.60	5.15	5.95	5.555	6.415	6.25	7.22
4.86	5.61	5.17	5.97	5.60	6.47	6.50	7.51
4.87	5.62	5.20	6.01	5.61	6.48	6.75	7.80
4.88	5.64	5.25	6.06	5.65	6.53	6.80	7.85
4.89	5.65	5.28	6.10	5.665	6.545	6.85	7.91
4.90	5.66	5.30	6.12	5.70	6.58	6.90	7.97
4.95	5.72	5.33	6.16	5.75	6.64	6.95	8.03
4.97	5.74	5.35	6.18	5.83	6.73	7.00	8.09
5.00	5.78	5.39	6.23	5.85	6.76	7.25	8.37

Freight firemen.		Freight firemen.		Freight firemen.		Freight firemen.	
Old.	New.	Old.	New.	Old.	New.	Old.	New.
\$2.25	\$3.02	\$2.93	\$3.93	\$3.23	\$4.34	\$3.75	\$5.03
2.36	3.17	2.95	3.96	3.245	4.355	3.80	5.10
2.45	3.29	3.00	4.03	3.25	4.36	3.90	5.24
2.47	3.32	3.01	4.04	3.30	4.43	3.905	5.245
2.50	3.36	3.03	4.07	3.35	4.50	3.95	5.30
2.56	3.44	3.04	4.08	3.40	4.56	4.00	5.37
2.59	3.48	3.05	4.09	3.45	4.63	4.05	5.44
2.60	3.49	3.07	4.12	3.465	4.65	4.10	5.50
2.70	3.62	3.10	4.16	3.50	4.70	4.125	5.535
2.75	3.69	3.13	4.20	3.55	4.77	4.18	5.61
2.78	3.73	3.15	4.23	3.57	4.79	4.25	5.71
2.81	3.77	3.16	4.24	3.60	4.83	4.30	5.77
2.85	3.83	3.19	4.28	3.63	4.87	4.50	6.04
2.87	3.85	3.20	4.30	3.65	4.90	4.55	6.11
2.90	3.89	3.22	4.32	3.70	4.97		

Freight conductors.		Freight conductors.		Freight conductors.		Freight conductors.	
Old.	New.	Old.	New.	Old.	New.	Old.	New.
\$2.31	\$2.78	\$4.24	\$5.11	\$4.54	\$5.47	\$4.88	\$5.88
2.90	3.49	4.25	5.12	4.55	5.48	4.96	5.98
3.46	4.17	4.27	5.15	4.63	5.58	5.04	6.07
3.63	4.37	4.38	5.28	4.64	5.59	5.08	6.12
3.85	4.64	4.40	5.30	4.66	5.62	5.10	6.15
3.90	4.70	4.42	5.33	4.74	5.71	5.14	6.19
3.975	4.79	4.43	5.34	4.77	5.75	5.21	6.28
4.00	4.82	4.48	5.40	4.80	5.78	5.67	6.83
4.10	4.94	4.50	5.42	4.83	5.82	5.69	6.86
4.13	4.98	4.51	5.43	4.84	5.83	6.12	7.37
4.165	5.02	4.52	5.45	4.86	5.86	6.45	7.77
4.18	5.04	4.53	5.46	4.87	5.87	7.09	8.54

Freight brakemen and flagmen.		Freight brakemen and flagmen.		Freight brakemen and flagmen.		Freight brakemen and flagmen.	
Old.	New.	Old.	New.	Old.	New.	Old.	New.
\$1.60	\$2.23	2.70	\$3.77	\$3.02	\$4.21	\$3.48	\$4.85
1.89	2.64	2.72	3.79	3.10	4.32	3.60	5.02
1.93	2.69	2.75	3.84	3.13	4.37	3.62	5.05
2.14	2.99	2.78	3.88	3.14	4.38	3.66	5.11
2.25	3.14	2.80	3.91	3.15	4.39	3.707	5.17
2.33	3.25	2.82	3.93	3.20	4.46	3.71	5.18
2.40	3.35	2.83	3.95	3.21	4.48	3.93	5.48
2.42	3.38	2.85	3.98	3.25	4.53	4.24	5.91
2.48	3.46	2.88	4.02	3.29	4.59	4.26	5.54
2.60	3.63	2.95	4.12	3.33	4.65	4.62	6.44
2.62	3.65	2.98	4.16	3.41	4.76	4.96	6.92
2.65	3.70	2.99	4.17	3.46	4.83	5.37	7.49
2.67	3.72	3.00	4.19				

"Old" rates are those of December, 1915.

If there were mileage rates in effect in December, 1915 which are not included in the above tables, they shall be increased in accordance with the following percentage:

	Per cent.
Road passenger engineers and motormen .....	11 $\frac{1}{4}$
Road passenger firemen and helpers .....	28 $\frac{3}{4}$
Road passenger conductors .....	15 $\frac{1}{2}$
Road passenger baggagemen .....	38 $\frac{1}{4}$
Road passenger brakemen and flagmen .....	39 $\frac{1}{2}$
Road freight engineers and motormen .....	15 $\frac{1}{2}$
Road freight firemen and helpers .....	34 $\frac{1}{4}$
Road freight conductors .....	20 $\frac{1}{2}$
Road freight brakemen and flagmen .....	39 $\frac{1}{2}$

#### METHOD OF APPLYING INCREASES TO MILEAGE BASIS.

(1) Rates for overtime as now in effect, whether providing for pro rata basis or in excess thereof, shall be increased by same percentage as straight time rates.

(2) Miles run, in excess of the established equivalent of a day (or of a month where such basis prevails) shall be paid for pro rata.

(3) If any increase has been made in the mileage rates of employees paid on that basis in December, 1915, it will be understood that the per cent of increase allowed by this order is inclusive of such interim increases and that the new rate is computed from the base rates of December, 1915.

(4) Example (1): Engineer "G," passenger service, received \$4.25 per day of one hundred miles in 10 hours in December, 1915. According to this plan, although in 1918 this rate was \$4.25 per hundred miles in 8 hours, the rate will be increased 11 $\frac{1}{4}$  per cent to \$4.73 per 100 miles (\$4.7281 equalized as \$4.73). He will be entitled to back pay for every 100 miles run at the rate of 48 cents per 100 miles.

Example (2):

Conductor through freight:

2,950 miles at 4 cents, at new rate, would entitle

his to 4.82 cents, or ..... \$142.19

He was paid ..... 118.00

Leaving to be paid ..... 24.19

He made 26 hours and 10 minutes overtime, equivalent, on basis of $12\frac{1}{2}$ miles per hour, to 327 miles, which, at the increased rate of 4.82 cents per mile, entitles him to .....	15.76	
Was paid, at 4 cents per mile .....	13.08	
A difference of .....		2.68
One month .....	26.87	
Five months .....	134.35	

This principle will apply to all employees of the train and engine service who are paid on the mileage basis. There are some railroads in the United States upon which men in the train and engine service are paid on a monthly wage. Such employees will be entitled to the increased rates named in Article 2, section A.

(5) Since the application of the increases hereby granted will tend in individual cases to give increases greater than is appropriate or necessary to those train and engine men who make abnormal amounts of mileage and who, therefore, make already abnormally high monthly earnings, the officials of each railroad shall take up with the respective committees of train and engine men the limitation of mileage made per month by employees paid upon a mileage basis, so as to prevent employees now making such abnormal mileage profiting by the wage increases herein fixed greatly in excess of employees habitually making a normal amount of mileage. It shall be understood that any such limitation of mileage so arrived at shall not preclude the officials of a railroad from requiring a train or engine man to make mileage in excess of this limitation when the necessities of the service require it. The officials of each railroad will report to the Regional Director such arrangements agreed upon and any cases of failure to reach such agreements.

*Section F.—General Rules for Application of Wage Increases.*

(1) In the application of the scale the wage runs with the place. If in the past two years an employee has been promoted, his new wage is based upon the rate of increase applicable to the new schedule governing the position to which he has been promoted.

(2) In applying these percentages to the hourly, daily, monthly, or mileage rates for December, 1915, in order to determine the rates to be applied, beginning January 1, 1918, each decimal fraction over 1 per cent shall be equalized as follows:

Less than one-fourth of 1 per cent, as one-fourth of 1 per cent.

Over one-fourth of 1 per cent, but less than one-half of 1 per cent, as one-half of 1 per cent.

Over one-half of 1 per cent, but less than three-fourths of 1 per cent, as three-fourths of 1 per cent.

Over three-fourths of 1 per cent, as 1 per cent.

(3) These increases are to be applied to the rates of wages in effect on December 31, 1915. They do not represent a net increase at this time.

(4) As to the employee who may have been promoted since December 31, 1915, his increase will be based upon the rate of his present position as of December 31, 1915.

(5) As to the employee who has been reduced in position, his increase will be based upon the rate of his present position as of December 31, 1915.

(6) The new rates named herein, where they are higher than the rates in effect on January 1, 1918, will be applied to the occupants of positions that carried the rates in December, 1915.

(7) In those cases where increases have been made by the railroads since December 31, 1915, in excess of the amounts herein ordered, present wages shall apply, for in no instance shall the application hereof operate to reduce present rates of pay.

(8) Reductions in hours between December 31, 1915, and January 1, 1918, are not to be regarded as increases in pay.

(9) The wage increases provided for herein shall be effective as of January 1, 1918, and are to be paid according to the time served to all who were then in the railroad service or who have come into such service since and remained therein. The proper ratable amount shall also be paid to those who have been for any reason since January 1, 1918, dismissed from the service, but shall not be paid to those who have left it voluntarily. Men who have left the railroads to enter the Army or Navy shall be entitled to the pro rata increases accruing on their wages up to the time they left, and the same rule shall apply to those who have passed from one branch of the railroad service or from one road to another.

(10) This order applies to foremen, chief clerks, and others employed in a supervisory capacity, as well as to their subordinates.

(11) This order shall be construed to apply to employees of railroads operating ferries, tugboats, lighters, barges, and any other floating equipment operated as terminal or transfer facilities, but shall not be construed as applying to railroad employees on cargo and passenger carrying equipment on lakes, rivers, or in coastwise or ocean traffic.

(12) The provisions of this order will not apply in cases where amounts less than \$30 per month are paid to individuals for special service which takes only a portion of their time from outside employment or business.

(13) Office boys, messengers, chore boys, and similar positions filled by employees who are under 18 years of age will receive the following increase per month:

\$20 increase per month where December, 1915, rate was from \$30 to \$45 per month.

\$15 increase per month where December, 1915, rate was from \$20 to \$30 per month.

\$10 increase per month where December, 1915, rate was less than \$20 per month.

#### ARTICLE III.—RULES GOVERNING CONDITIONS OF EMPLOYMENT.

##### *Section (a).—The Basic Eight-hour Day.*

The principle of the basic eight-hour day is hereby recognized. Where employees are paid upon a daily or monthly basis, the new compensation herein established will apply to the number of hours

which have heretofore constituted the actual day's work. For example, where an actual day's work has been 10 hours, the new compensation will cover the 8 basic hours and 2 hours overtime. Additional overtime will be paid pro rata.

METHOD OF APPLYING BASIC EIGHT-HOUR-DAY RULES.

- (1) Position which in December, 1915, paid \$2 per 9-hour day:  
 Old rate, \$2 per day.  
 New rate, \$2.70 for 8-hour basic day.  
 Overtime, 31.4 cents per hour.  
 New rate, \$3.38 for 10-hour service; 98 cents increase
- (2) Position which in December, 1915, paid \$2.40 per 10-hour day:  
 Old rate, \$2.40 per day.  
 New rate, \$2.70 for 8-hour basic day.  
 Overtime, \$0.68—2 hours, at 34 cents per hour.  
 New rate, \$3.38, for 10-hour service; 98 cents increase.
- (3) Position which in December, 1915, paid \$75 per month, working 10 hours per day for 26 working days:  
 Old rate, \$75 per month.  
 New rate, \$84.60 per month basic 8-hour day.  
 Overtime, \$35.93—93 hours, at 38.64 cents per hour.  
 New rate, \$105.75 for same service; increase, \$30.75.
- (4) Position which in December, 1915, paid \$100 per month, working 11 hours per day for 31 working days:  
 Old rate, \$100 per month.  
 New rate, \$95.82 per month basic 8-hour day.  
 Overtime, \$35.93—93 hours, at 38.64 cents per hour.  
 New rate, \$131.75 for same service; increase, \$31.75.

*Section (b).—Rates of Pay for Overtime.*

This order shall not affect any existing agreements or practices for the payment of higher rates of pay for time worked in excess of any standard day. Time worked in excess of the basic eight-hour day hereby established will, when there is no existing agreement or practice more favorable to the employee, be paid on a pro rata basis, as indicated in section (a) of this article.

*Section (c).—No Reduction in Total Increase.*

Pending consideration by the Board of Railroad Wages and Working Conditions hereinafter provided for, no reduction in the actual hours constituting a day's work shall operate to deprive any employee, paid by the day or month, of the total increase in pay granted him by this order.

ARTICLE IV.—PAYMENTS FOR BACK TIME.

Each railroad will, in payments made to employees on and after June 1, 1918, include these increases therein.

As promptly as possible, the amount due in back pay from January 1, 1918, in accordance with the provision of this order, will be computed and payment made to employees separately from the regular monthly payments, so that employees will know the exact amount of these back payments.



Recognizing the clerical work necessary to make these computations for back pay and the probable delay before the entire period can be covered, each month, beginning with January, shall be computed as soon as practicable and, as soon as completed, payment shall be made.

ARTICLE V.—EMPLOYMENT OF WOMEN.

When women are employed, their working conditions must be healthful and fitted to their needs. The laws enacted for the government of their employment must be observed and their pay, when they do the same class of work as men, shall be the same as that of men.

ARTICLE VI.—COLORED FIREMEN, TRAINMEN AND SWITCHMEN.

Effective June 1, 1918, colored men employed as firemen, trainmen and switchmen shall be paid the same rates of wages as are paid white men in the same capacities.

Back pay for period January 1, 1918, to May 31, 1918, will be based only upon the increases provided in Article II of this order for such positions. Back payments will not apply to the further increased rate made effective by this Article.

ARTICLE VII.—BOARD OF RAILROAD WAGES AND WORKING CONDITIONS.

There is hereby created a Board of Railroad Wages and Working Conditions which shall consist of the following members: J. J. DERMODY, F. F. GAINES, C. E. LINDSEY, W. E. MORSE, G. H. SINES, A. O. WHARTON.

This Board shall at once establish an office at Washington, D. C., and meet for organization and elect a Chairman and Vice Chairman, one of whom shall preside at meetings of the Board.

It shall be the duty of the Board to hear and investigate matters resented by railroad employees or their representatives affecting.

- (1) Inequalities as to wages and working conditions whether as to individual employees or classes of employees.
- (2) Conditions arising from competition with employees in other industries.
- (3) Rules and working conditions for the several classes of employees, either for the country as a whole or for different parts of the country.

The Board shall also hear and investigate other matters affecting wages and conditions of employment referred to it by the Director General.

This Board shall be solely an advisory body and shall submit its recommendations to the Director General for his determination.

ARTICLE VIII.—INTERPRETATIONS OF THIS ORDER.

Railway Board of Adjustment No. 1 is authorized by Article 9 of General Order No. 13 to perform the following duty:

Wages and hours, when fixed by the Director General, shall be incorporated into existing agreements on the several railroads, and should differences arise between the management and the employees of any of the railroads as to such incorporation, such questions of difference shall be decided by the Railway Board of Adjustment No. 1, when properly presented, subject always to review by the Director General.

In addition to the foregoing, other questions arising as to the intent or application of this order in respect to the classes of employees within the scope of Railway Board of Adjustment No. 1 shall be submitted to such Board, which Board shall investigate and report its recommendations to the Director General.

Similar authority may be conferred on any additional Railway Board of Adjustment hereafter created.

Decisions shall not be rendered by such Boards until after approval by the Director General.

Prior to the creation of additional Railway Boards of Adjustment to deal with questions as to the intent or application of this order as it affects any other class of employees, such questions, with respect to such employees, shall be presented to the Director of the Division of Labor, United States Railroad Administration, Washington, D. C.

W. G. McAdoo,  
Director General of Railroads.

#### SUPPLEMENT NO. 1 TO GENERAL ORDER NO. 27.

UNITED STATES RAILROAD ADMINISTRATION.

W. G. McAdoo, Director General.

Washington, June 10, 1918.

The following will be added as general rules to Section F, Article 11:

(14) For positions created since December, 1915, the salaries will be readjusted so as to conform to the basis established in General Order No. 27, for positions of similar scope or responsibility.

(15) Where wages were increased through arbitration or other general negotiations, which cases were definitely closed out prior to December 1, 1915, but which for any reason were not put into effect until after January 1, 1916, the increases fixed by General Order No. 27 will be applied to such basis of wages as if they were in effect in December, 1915.

W. G. McAdoo,  
Director General of Railroads.

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#### SUPPLEMENT NO. 2 TO GENERAL ORDER NO. 27.

The terms and conditions of the above order will apply to the Pullman Company Operating Department, except that on account of the peculiar character of the employment of conductors, porters and maids, in that provision is made for rest and sleep while actually on duty, it is impracticable to apply a basic eight hour day to such service. It is therefore ordered that with respect to conductors, porters and maids, the increases shall be upon the basis shown in Section A of Article Two relative to "monthly wages;" but Article Three relative to basic eight hour day will not be applicable thereto.

W. G. McAdoo,  
Director General of Railroads.

## INTERPRETATION NO. 1 OF GENERAL ORDER NO. 27.

The following recommendation of Railroad Board of Adjustment No. 1, in the matter of construction of General Order No. 27, relating to the bases of pay for yard engineers, yard firemen, yard conductors or foremen, and yard brakemen or helpers, is approved and will be observed in the application of rates of pay under said Order:

"Referring to your letter of this date transmitting a communication from the Chief Executives of the four Organizations, asking for a construction of General Order No. 27, insofar as this Order relates to the bases of pay for yard engineers, yard firemen, yard conductors or foremen, and yard brakemen or helpers.

"As these four classes of employes had a guaranteed minimum day's pay, irrespective of how expressed in schedules, it is the judgment of this Board that the increases granted by General Order No. 27 should be applied to such employes upon the guaranteed minimum day's pay of December, 1917, in view of Paragraph 8, Section F, Article 2, of that Order, which reads as follows:

'Reductions in hours between December 31, 1915, and January 1, 1918, are not to be regarded as increases in pay.'

"The increases for these classes of employes should, therefore, be computed upon the table given in Section B of Article 2 of General Order No. 27, and it is recommended that it be so ordered."

W. G. McAdoo,  
Director General of Railroads.

## INTERPRETATION NO. 2 OF GENERAL ORDER NO. 27.

UNITED STATES RAILROAD ADMINISTRATION.

Office of the Director General,

Washington, June 14, 1918.

The following bases will be observed in the application of rates of pay under General Order No. 27:

All persons employed in any capacity, and receiving less than \$250.00 per month in salary, will receive the increases named in the Director General's General Order No. 27, unless specifically excluded therein.

## PASSENGER SERVICE

All conductors, baggagemen, flagmen and brakemen paid on the mileage basis and performing more than the minimum daily mileage will be paid under the provisions of Section E, Article 2.

All conductors, assistant conductors, ticket collectors, baggagemen, flagmen and brakemen paid under the monthly guarantee of the Eastern and Southeastern Territory, will be paid under the provisions of Section A, Article 2, and the daily rate will be 1/30 of the monthly rate.

All conductors, baggagemen, flagmen and brakemen paid on the monthly basis will be paid under the provisions of Section A, Article 2.

## LOCAL FREIGHT SERVICE.

All conductors, engineers, firemen, flagmen and brakemen paid on the mileage basis will be paid under the provisions of Section E, Article 2.

Local freight conductors, engineers, firemen, flagmen and brakemen paid on the monthly basis will be paid under the provisions of Section A, Article 2.

## THROUGH FREIGHT SERVICE.

Conductors, engineers, firemen, flagmen and brakemen paid on the mileage basis will be paid under the provisions of Section E, Article 2.

Conductors, engineers, firemen, flagmen and brakemen paid on the monthly basis will be paid under the provisions of Section A, Article 2.

## WORK TRAINS.

Conductors, engineers, firemen, flagmen and brakemen paid on the mileage basis will be paid under the provisions of Section E, Article 2.

Conductors, engineers, firemen, flagmen and brakemen paid on the monthly basis will be paid under the provisions of Section A, Article 2.

## SPECIFIED TRIP RATES.

In passenger, through freight or local freight, the increases in trip rates shall take the percentages applicable to each class of service respectively.

## SPECIAL ALLOWANCES.

All arbitrary or special allowances, previously paid on the hourly basis, will be paid at the new hourly rate.

Arbitraries or special allowances, previously paid on the bases of mileage, will be paid on the new mileage rates.

If the schedule amount bears no relation to miles or hours, such arbitrary or special allowances will be increased in accordance with the percentage shown under Section E, Article 2.

Engines which have come into the service since 1915, on which rates have been applied—for the purpose of computation under General Order No. 27, consider such rates as being applicable December 31, 1915, and apply appropriate increases from January 1, 1918.

The negotiated rate since the Arbitration of the Engineers and Firemen in the East and West, for transfer service—for example, the \$4.50 rate for engineers and the \$3.00 rate for firemen in the Western territory shall be increased under Section B of Article 2. Where through freight rates apply to transfer service, the increases under Section E, Article 2, will apply.

Where the guaranteed daily minimum is an arbitrary rate, and is not based on hours or miles, engineers and firemen will be paid the rate under the provisions of Section B, Article 2. Where the guaranteed minimum is based on mileage, engineers and firemen shall be paid the rate under the provisions of Section E, Article 2.

## HOSTLERS.

The rates in Section B, Article 2, shall apply to hostlers, based upon rates in effect December, 1915.

W. G. McADOO,  
Director General of Railroads.

## GENERAL ORDER NO. 28.

UNITED STATES RAILROAD ADMINISTRATION

Office of the Director General

Washington, D. C., May 25, 1918.

Whereas it has been found and is hereby certified to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, and

Whereas the public interest requires that a general advance in all freight rates, passenger fares, and baggage charges on all traffic carried by all railroad and steamship lines taken under Federal control under an act of Congress approved August 29, 1916, entitled "An act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," shall be made by initiating the necessary rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission under authority of an act of Congress approved March 21, 1918, entitled "An act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes."

Now, therefore, under and by virtue of the provisions of the said act of March 21, 1918, it is ordered that all existing freight rates, passenger fares, and baggage charges, including changes heretofore published but not yet effective, on all traffic carried by all said railroad and steamship lines under Federal control, whether the same be carried entirely by railroad, entirely by water, or partly by railroad and partly by water, except traffic carried entirely by water to and from foreign countries, be increased or modified, effective June 25, 1918, as to freight rates and effective June 10, 1918, as to passenger fares and baggage charges, to the extent and in the manner indicated and set forth in the "Exhibit" hereto attached and made part hereof, by filing schedules with the Interstate Commerce Commission effective on not less than one day's notice.

Given under my hand this the 25th day of May, 1918.

W. G. McADOO,

Director General of Railroads.

## EXHIBIT.

## FREIGHT RATES.

*Section 1. Class Rates (Domestic).*

(a) All interstate class rates shall be increased twenty-five (25) per cent.

(b) All intrastate class rates shall be increased twenty-five (25) per cent where there are no interstate class rates published between the same points, and shall be governed by the classification, viz:

Official Classification, Southern Classification, or Western Classification, exceptions thereto and minimum weights which generally govern the interstate rates in the same territory, except that the Illinois Classification will be used between points in the State of Illinois.

(c) All intrastate class rates shall be canceled where there are interstate class rates published between the same points and the interstate rates as increased by paragraph (a) shall apply.

(d) After such increase of twenty-five (25) per cent no rates shall be applied on any traffic moving under class rates lower than the amounts in cents per 100 pounds for the respective classes as shown below for the several classifications. Any article, on which Exceptions to any Classification provides a different rating than as shown in the Classification to which it is an exception, will be subject to the minimum as provided below for the class provided therefor in the Classification proper:

#### OFFICIAL CLASSIFICATION.

Classes .....	1	2	3	4	5	6
Rates .....	25	21½	17	12½	9	7

#### SOUTHERN CLASSIFICATION.

Classes .....	1	2	3	4	5	6	A	B	C	D
Rates .....	25	21½	19	16	13	11	9	10	7½	6½

#### WESTERN CLASSIFICATION.

Classes .....	1	2	3	4	5	A	B	C	D	E
Rates .....	25	21	17½	15	11	12½	9	7½	6½	5

#### ILLINOIS CLASSIFICATION.

Classes .....	1	2	3	4	5	6	7	8	9	10
Rates .....	25	21	17½	15	11	12½	9	7½	6½	5

#### Section 2. Commodity Rates (Domestic).

(a) Interstate commodity rates on the following articles in car-loads shall be increased by the amounts set opposite each:

##### Coal: Commodities

##### Increases.

Where rate is 0 to 49 cents per ton .....	<sup>1</sup> 15	cents per net ton of 2,000 pounds.
Where rate is 50 to 99 cents per ton .....	<sup>1</sup> 20	cents per net ton of 2,000 pounds.
Where rate is \$1.00 to \$1.99 per ton .....	<sup>1</sup> 30	cents per net ton of 2,000 pounds.
Where rate is \$2.00 to \$2.99 per ton .....	<sup>1</sup> 40	cents per net ton of 2,000 pounds.
Where rate is \$3.00 or higher per ton .....	<sup>1</sup> 50	cents per net ton of 2,000 pounds.

##### Coke:

Where rate is 0 to 49 cents per ton .....	<sup>2</sup> 15	cents per net ton of 2,000 pounds.
Where rate is 50 to 99 cents per ton .....	<sup>2</sup> 25	cents per net ton of 2,000 pounds.
Where rate is \$1 to \$1.99 per ton .....	<sup>2</sup> 40	cents per net ton of 2,000 pounds.
Where rate is \$2 to \$2.99 per ton .....	<sup>2</sup> 60	cents per net ton of 2,000 pounds.
Where rate is \$3 or higher per ton .....	<sup>2</sup> 75	cents per net ton of 2,000 pounds.

- of the Mississippi River, except points in Arkansas, Louisiana, and Texas, twenty-two (22) cents per 100 pounds; to points on and north of the Ohio River and east of the Indiana-Illinois State line rates shall be increased to maintain the former established relation to the rates to such points from producing points on Atlantic seaboard.
- (4) From producing points in Colorado, Wyoming, Montana, Kansas, and Nebraska to Missouri River territory and points in Arkansas, Oklahoma, Louisiana, and Texas and points east thereof twenty-two (22) cents per 100 pounds.
  - (5) From points in Idaho and Utah to points named in paragraph (3) rates shall be fifteen (15) cents above the rates from eastern Colorado.
  - (6) From points in California to points taking Missouri River rates and points related thereto under the Commission's Fourth Section Orders, and to points east of the Missouri River, twenty-two (22) cents per 100 pounds.

(b) Interstate commodity rates not included in the foregoing list shall be increased twenty-five (25) per cent.

(c) Intrastate commodity rates shall be increased as shown in paragraphs (a) and (b) of this section where there are no interstate commodity rates published on substantially the same commodities between the same points, and shall be subject to the minimum weights applicable on interstate traffic in the same territory.

(d) Intrastate commodity rates shall be canceled where interstate commodity rates are published on substantially the same commodities between the same points, and the interstate rates as increased by paragraphs (a) and (b) of this section shall apply.

(e) In applying the increases prescribed in this section the increased class rates applicable to like commodity descriptions and minimum weights between the same points are not to be exceeded, except that the increases in rates on sugar in carloads shall be made as expressly provided in paragraph (a) of this section.

*Section 3. Export and Import Rates.* All export and import rates shall be cancelled and domestic rates applied to and from the ports.

*Section 4. Filing Intrastate Tariffs with Interstate Commerce Commission.* (a) All intrastate rates and all rates for transportation by water, which are to be increased under this order, if not now on file, except rates canceled under paragraph (c) of section 1 and paragraph (d) of section 2, shall be immediately filed with the Interstate Commerce Commission.

(b) All items which are confined in their application to intrastate traffic, but are now carried in tariffs on file with the Interstate Commerce Commission, if not cancelled under paragraph (c) of section 1 and paragraph (d) of section 2, shall be made applicable to all traffic.

<i>Commodities</i>	<i>Increases.</i>
Cotton .....	Fifteen (15) cents per 100 lbs.
Cotton linters .....	New cotton rates.
Live stock .....	Twenty-five (25) per cent, but not exceeding an increase of seven (7) cents per 100 lbs., where rates are published per 100 lbs., or \$15.00 per standard 36-foot car where rates are published per car.
Packing-house products and fresh meats .....	Twenty-five (25) per cent, except that the rates from all Missouri River points to Mississippi River territory and east thereof shall be the same as the new rates from St. Joseph, Mo.
Bullion, base (copper or lead), pig or slab and other smelter products .....	<p>Twenty-five (25) per cent, except—</p> <ol style="list-style-type: none"> <li>1. That rates from producing points in the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, and Washington to New York, N. Y., shall be sixteen dollars and fifty cents (\$16.50) per net ton with established differentials to other Atlantic seaboard points, and</li> <li>2. Rates from points in Colorado and El Paso, Tex., to Atlantic seaboard points shall be increased six dollars and fifty cents (\$6.50) per net ton.</li> </ol> <p>Separately established rates used as factors in making through rates to the Atlantic seaboard shall be increased in amounts sufficient to protect the through rates as above increased.</p>
Sugar, including syrup and molasses where sugar rates apply thereon .....	<p>Twenty-five (25) per cent, except:</p> <ol style="list-style-type: none"> <li>1. Where the Official Classification applies, 5th class rates as increased will apply.</li> <li>2. From points east of the Indiana-Illinois State line to points west of the Mississippi River, rates will continue to be made on combination of local rates or of proportional rates if published, to and from the Mississippi River; except that from points on the Atlantic seaboard to the Missouri River, Kansas City, Mo., to Sioux City, Iowa, inclusive, established differentials over the increased rates from New Orleans, La., shall be maintained.</li> <li>3. From points in the States south of the Ohio River and east of the Mississippi River, also from points in the States of Louisiana and Texas, rates shall be increased: To Chicago, Ill., twenty-two (22) cents per 100 pounds; to St. Louis, Mo., twenty-seven and one-half (27½) cents per 100 pounds; to other points west of the Indiana-Illinois State line and west</li> </ol>



Ores, iron .....	30 cents per net ton of 2,000 pounds; except that no increase shall be made in rates on ex-lake ore that has paid one increased rail rate before reaching lake vessel.
Stone, artificial and natural, building and monumental, except, carved, letters, polished, or traced .....	Two (2) cents per 100 lbs.
Stone, broken, crushed, and ground .....	One (1) " " "
Sand and gravel .....	One (1) " " "
Brick, except enameled or glazed .....	Two (2) " " "
Cement, cement plasters, and plaster .....	Two (2) " " "
Lime .....	One and one-half (1½) cents per 100 lbs.
Lumber and articles taking same rates or arbitraries over lumber rates; also other forest products, rates on which are not higher than on lumber .....	Twenty-five (25%) per cent, but not exceeding an increase of five cents per 100 lbs.
Grain, wheat .....	Twenty-five (25%) per cent, but not exceeding an increase of six cents per 100 lbs.
Other grain .....	New wheat rates.
Flour and other mill products	Twenty-five (25) per cent, but not exceeding an increase of six (6) cents per 100 lbs., and increased shall be not less than new rates on wheat.

<sup>1</sup> Where rates have not been increased since June 1, 1917, the increase to be made now shall be determined by first adding to the present rate fifteen (15) cents per ton, net or gross as rated, or if an increase of less than fifteen (15) cents per ton, net or gross as rated, has been made since that date, then by first adding to the present rate the difference between the amount of that increase and fifteen (15) cents per ton, net or gross as rated; and to the rates so constructed the above increases shall now be added.

Where rates from producing points or to destinations have been based on fixed differentials in cents per ton, such differentials to be maintained, the increase to be figured on the highest rated point or group.

<sup>2</sup> Where rates have not been increased since June 1, 1917, the increase to be made now shall be determined by first adding to the present rate fifteen (15) cents per ton, net or gross as rated, or if an increase of less than fifteen (15) cents per ton, net or gross as rated, has been made since that date, then by first adding to the present rate the difference between the amount of that increase and fifteen (15) cents per ton, net or gross as rated; and to the rates so constructed the above increases shall now be added.

Where rates from producing points or to destinations have been based on fixed differentials in cents per ton, such differentials to be maintained, the increase to be figured on the highest rated point or group.

*Section 5. Minimum Charges.* (a) The minimum charge on less than carload shipments shall be as provided in the classification governing, but in no case shall the charge on a single shipment be less than fifty cents.

(b) The minimum charge for carload shipments shall be fifteen dollars per car. Does not apply to charges for switching service.

*Section 6. Disposition of Fractions.* In applying rates, fractions shall be disposed of as follows:

(a) Rates in cents or in dollars and cents per 100 pounds or per package.

Fractions of less than  $\frac{1}{4}$  or 0.25 to be omitted.

Fractions of  $\frac{1}{4}$  or 0.25, or greater, but less than  $\frac{3}{4}$  or 0.75 to be shown as one-half ( $\frac{1}{2}$ ).

Fractions of  $\frac{3}{4}$  or 0.75, or greater, to be increased to the next whole figure.

(b) Rates per ton:

Amounts of less than five cents to be omitted.

Amounts of five cents or greater, but less than ten cents, to be increased to ten cents.

(c) Rates per car:

Amounts of less than twenty-five cents to be omitted.

Amounts of twenty-five cents or greater, but less than seventy-five cents, to be shown as fifty cents.

Amounts of seventy-five cents or greater, but less than one dollar, to be increased to one dollar.

*Section 7. Observance of Differentials.* In establishing the freight rates herein ordered, while established rate groupings and fixed differentials are not required to be used, their use is desirable, if found practicable, even though certain rates may result which are lower or higher than would otherwise obtain.

#### PASSENGER FARES AND BAGGAGE CHARGES.

*Section 8.* This order shall apply to all the passenger fares, both interstate and intrastate, of the railroads under Federal control. No existing fare equal to or in excess of three (3) cents per mile shall be reduced. All fares now constructed on a lower basis than three (3) cents per mile shall be advanced to the basis of three (3) cents per mile. All fares which are on a lower basis than the said existing or advanced fares, as the case may be, such as mileage or excursion tickets, shall be discontinued. These requirements are subject to the following exceptions:

(a) The provisions of section 1 and 22 of the act to regulate commerce, which authorize free or reduced fares or transportation, may be observed, except—

First. That no mileage ticket shall be issued at a rate that will afford a lower fare than the regular one-way tariff, and except—

Second. That excursion tickets may be issued only to the extent and on the terms set forth in paragraphs (b) and (c) below:

(b) Round-trip tourist fares shall be established on a just and reasonable basis bearing proper relation to the one-way fares author-

ized by this order, and tariffs governing same shall be filed as promptly as possible with the Interstate Commerce Commission.

(c) For the national encampment of the Grand Army of the Republic and auxiliary and allied organizations at Portland, Oreg., in 1918, and for the United Confederate Veterans Reunion, auxiliary and allied organizations at Tulsa, Okla., in 1918, a rate of one cent per mile in each direction via direct routes shall be authorized and confined by certificate of identification to the membership of these organizations and members of their immediate families. For the various state meetings of these organizations held during the year 1918, fares shall be authorized under like conditions on basis of two (2) cents per mile in each direction and confined to limits of the State in which the meeting is held.

(d) Where public convenience will be served thereby, subject to the approval of the Director General, fares determined by the short line may be applied over longer practicable routes.

(e) Officers, enlisted men, and nurses of the United States Army, Navy, and Marine Corps when traveling in uniform at own expense, shall be granted the privilege of purchasing passage tickets at one-third ( $\frac{1}{3}$ ) the regular one-way fare, via route of ticket, applicable in coach, parlor or sleeping car, as the case may be, when on furlough or official leave of absence, except that this reduced fare shall not be granted on short-term passes from camps or when on liberty from ships or stations to nearby cities.

Applicants for such tickets shall be required to submit for inspection of ticket agent military furlough or other official form of leave of absence and to surrender to ticket agent a furlough fare certificate signed by a commanding officer.

(f) Children under five years of age, when accompanied by parent or guardian, shall be carried free; children five years and under twelve of age shall be charged half fare.

*Section 9.* Commutation fares shall be advanced ten (10) per cent. Commutation fares shall be construed to include all forms of transportation designed for suburban travel and for the use of those who have daily or frequent occasion to travel between their homes and places of employment or educational institutions.

*Section 10.* Passengers traveling in standard sleeping cars and parlor cars shall be required to pay an additional passage charge of sixteen and two-thirds ( $16\frac{2}{3}$ ) per cent of the normal one-way fare, and passengers traveling in tourist sleeping cars an additional passage charge of eight and one-third ( $8\frac{1}{3}$ ) per cent of the normal one-way fare. The foregoing charges are in addition to those required for the occupancy of berths in sleeping cars or seats in parlor cars.

*Section 11.* The following minimum number of tickets of the class good for passage in sleeping or parlor cars shall be required for occupancy of drawing rooms, compartments or sections in parlor or sleeping cars:

Two adult tickets for a drawing room in a sleeping car.

Two adult tickets for a compartment.

One and one-half adult tickets for a section.

Five adult tickets for exclusive occupancy of drawing room in a parlor car.

*Section 12.* Passenger fares or charges for accommodation and transportation of passengers entirely by water, or partly by water and partly by rail, shall be increased proportionately with fares and charges for the transportation of passengers via rail.

*Section 13.* The basis for computing charges for excess baggage transported under lawfully effective tariff shall be sixteen and two-thirds (16 2-3) per cent of the normal one-way passenger fare, with minimum of fifteen (15) cents per 100 pounds and minimum collection of twenty-five (25) cents per shipment.

*Section 14.* Tickets purchased prior to June 10, 1918, will not be honored for passage on and after that date, except—

(a) Passengers en route on June 10 1918, on one-way tickets will be carried to destination by continuous passage without additional charge.

(b) Round-trip tickets, portions of which have been used prior to June 10, 1918, or held by passengers en route on June 10, 1918, shall be honored in accordance with original tariff conditions under which sold without additional payment except that they shall be subject to the same requirements as one-way tickets in respect of additional payment for passage in sleeping or parlor cars as prescribed in section 10.

Tickets made invalid for passage by this order will be redeemed from original purchasers as follows:

Unused tickets will be redeemed at amount paid therefor.

Partially used one-way tickets will be redeemed by charging tariff fare at time of journey for portion used and refunding difference between such amount and fare at which sold.

In redemption of mileage, scrip, or credentials forms the purchaser shall be given the benefit for the distance traveled of a net basis proportionate to that which would have applied had the entire book been used according to its contract.

*Section 15.* All passenger fares lower than those hereinbefore prescribed, such as mileage, party, second-class, immigrant, convention, excursion, and tourist fares, shall be discontinued until further notice, except that tourist fares shall be reestablished as prescribed in section 8, paragraph (b) hereof.

*Section 16.* Tariff provisions intended to assure the long haul to carriers, and which prevent the free interchange of traffic, shall be eliminated.

*Section 17.* Stop-overs on one-way tickets, side trips at free or reduced fares, discounts by use of excess-baggage permits or excess money coupon books, and the sale of one-way tickets bearing limit in excess of time necessary to make trip by continuous passage shall be discontinued.

*Section 18.* Optional routes may be used only when specified in tariffs.

*Section 19.* In publishing fares and charges under this order, tariffs may be used which increase the present fares by fixed percentage to bring them to the bases authorized herein, even though the actual fares so constructed may be fractionally more or less than three (3) cents per mile.

GENERAL.

*Section 20.* Where the Interstate Commerce Commission prior to the date hereof has authorized or prescribed rates, fares, and charges, which have not been published at the date of this order, the rates, fares, or charges initially established hereunder by applying the increases herein prescribed to the existing or published rates, fares, or charges may be subsequently revised by applying the increases prescribed by the Interstate Commerce Commission.

*Section 21.* All schedules, viz, tariffs and supplements, published under the provisions of this order shall bear on the title-page the following, in bold-face type:

The rates <sup>1</sup> made effective by this schedule are initiated by the President of the United States through the Director General, United States Railroad Administration, and apply to both interstate and intrastate traffic.

This schedule is published and filed on one day's notice with the Interstate Commerce Commission under General Order No. 28 of the Director General, United States Railroad Administration, dated May 25, 1918.

<sup>1</sup> On passenger tariffs use word "fares." On baggage tariffs use word "charges."

SUPPLEMENT TO GENERAL ORDER NO. 28.

UNITED STATES RAILROAD ADMINISTRATION,  
Office of the Director General.

Washington, D. C., June 12, 1918.

It is ordered that General Order No. 28 be, and the same is hereby, supplemented by amending the terms and provisions of the exhibit attached thereto as follows:

Paragraphs (b) and (c) of section 1, paragraphs (c) and (d) of section 2, and paragraph (b) of section 4 are canceled.

Paragraph (a) of section 1 is amended to read as follows:

(a) All class rates, both interstate and intrastate, shall be increased twenty-five (25) per cent, except that between points in the State of Oklahoma the class rates for single and joint lines prescribed by the Interstate Commerce Commission for use between Shreveport, La., and points in Texas common-point territory, as shown on pages 345 and 346 of the forty-eighth volume of Interstate Commerce Commission reports, plus twenty-five (25) per cent, shall be applied.

Paragraph (d) of section 1 is amended to read as follows:

(d) After such increase on rates shall be applied on any traffic moving under class rates lower than the amounts in cents per

100 pounds for the respective classes as shown below for the several classifications. The minimum rate on any article shall be the rate for the class at which that article is rated in the classification shown below applying in the territory where the shipment moves.

OFFICIAL CLASSIFICATION.									
Classes	.....	1	2			3	4	5	6
Rates	.....	25	21½			17	12½	9	7
SOUTHERN CLASSIFICATION.									
Classes	.....	1	2	3	4	5	6	A	B
Rates	.....	25	21½	19	16	13	11	9	10
								7½	6¼
WESTERN CLASSIFICATION.									
Classes	.....	1	2	3	4	5	A	B	C
Rates	.....	25	21	17½	15	11	12½	9	7½
								6½	5
ILLINOIS CLASSIFICATION.									
Classes	.....	1	2	3	4	5	6	7	8
Rates	.....	25	21	17½	15	11	12½	9	7½
								6½	5

Paragraph (a) of section 2 is amended to read as follows:

(a) Commodity rates, both interstate and intrastate, on the following articles, applicable on carloads, except as otherwise provided, shall be increased by the amounts set opposite each:

Commodities.	Increases.
Coal:	
Where rate is 0 to 49 cents per ton	15 cents per net ton of 2,000 pounds.
Where rate is 50 to 99 cents per ton	20 cents per net ton of 2,000 pounds.
Where rate is \$1 to \$1.99 per ton	30 cents per net ton of 2,000 pounds.
Where rate \$2 to \$2.99 per ton	40 cents per net ton of 2,000 pounds.
Where rate is \$3 or higher per ton	50 cents per net ton of 2,000 pounds.

Where rates have not been increased since June 1, 1917, the increase to be made now shall be determined by first adding to the present rate fifteen (15) cents per ton, net or gross as rated, or if an increase of less than fifteen (15) cents per ton, net or gross as rated, has been made since that date, then by first adding to the present rate the difference between the amount of that increase and fifteen (15) cents per ton, net or gross as rated; and to the rates so constructed the above increases shall now be added.

Where rates from producing points or to destinations have been based on fixed differentials in cents per ton, such differentials to be maintained, the increase to be figured on the highest rated point or group.

Where rate is 0 to 49 cents per ton	15 cents per net ton of 2,000 pounds.
Where rate is 50 to 99 cents per ton	25 cents per net ton of 2,000 pounds.
Where rate is \$1 to \$1.99 per net ton	40 cents per net ton of 2,000 pounds.
Where rate is \$2 to \$2.99 per net ton	60 cents per net ton of 2,000 pounds.
Where rate is \$3 or higher per ton	75 cents per net ton of 2,000 pounds.

Where rates have not been increased since June 1, 1917, the increase to be made now shall be determined by first adding to the present rate fifteen (15) cents per ton, net or gross as rated, or if an increase of less than fifteen (15) cents per ton, net or gross as rated, has been made since that date, then by first adding to the present rate the difference between the amount of that increase and fifteen (15)

cents per ton, net or gross as rated; and to the rates so constructed the above increases shall now be added.

Where rates from producing points or to destinations have been based on fixed differentials in cents per ton, such differentials to be maintained, the increase to be figured on the highest rated point or group.

<i>Commodities.</i>	<i>Increases.</i>
Ores, iron .....	30 cents per net ton of 2,000 pounds; except that no increase shall be made in the rates on ex-lake ore that has paid one increased rail rate before reaching lake vessel.
Stone, artificial and natural, building and monumental, polished, or traced .....	Two (2) cents per 100 pounds.
Stone, broken, crushed, and ground .....	One (1) cent per 100 pounds.
Sand and gravel .....	One (1) cent per 100 pounds.
Brick, except enameled or glazed .....	Two (2) cents per 100 pounds.

<i>Commodities.</i>	<i>Increases.</i>
Cement, cement plasters, and plaster .....	Two (2) cents per 100 pounds.
Lime .....	One and one-half ( $1\frac{1}{2}$ ) cents per 100 pounds.
Lumber and articles taking same rates or arbitraries over lumber rates; also other forest products, rates on which are not higher than lumber .....	Twenty-five (25) per cent, but not exceeding an increase of five (5) cents per 100 pounds.
Grain, wheat .....	Twenty-five (25) per cent, but not exceeding an increase of six (6) cents per 100 pounds.
Other grain .....	New wheat rates.
Flour and other mill products .....	Twenty-five (25) per cent, but not exceeding an increase of six (6) cents per 100 pounds, and increased rates shall not be less than new rates on wheat.
Cotton, any quantity .....	Fifteen (15) cents per 100 pounds.
Cotton linters .....	New cotton rates.
Live stock .....	Twenty-five (25) per cent, but not exceeding an increase of seven (7) cents per 100 pounds, where rates are published per 100 pounds, or \$15 per standard 36-foot car where rates are published per car.
Packing-house products and fresh meats .....	Twenty-five (25) per cent, except that the rates from all Missouri River points to Mississippi River territory and east thereof shall be the same as the new rates from St. Joseph, Mo.

Bullion, base (copper or lead),  
pig or slab, and other smel-  
ter products .....

Twenty-five (25) per cent, except—

1. That rates from producing points in the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, and Washington to New York, N. Y., shall be sixteen dollars and fifty cents (\$16.50) per net ton with established differentials to other Atlantic seaboard points; and
2. Rates from points in Colorado and El Paso, Tex., to Atlantic seaboard points shall be increased six dollars and fifty cents (\$6.50) per net ton. Separately established rates used as factors in making through rates to the Atlantic seaboard shall be increased in amounts sufficient to protect the through rates as above increased.

*Commodities.*

*Increases.*

Sugar, including syrup and molasses, where sugar rates apply thereon .....

Twenty-five (25) per cent, except—

1. Where the Official Classification applies, 5th class rates as increased will apply.

2. From points east of the Indiana-Illinois State line to points west of the Mississippi River rates will continue to be made on combination of local rates or of proportional rates if published to and from the Mississippi River; except that from points on the Atlantic seaboard to the Missouri River, Kansas City, Mo., to Sioux City, Iowa, inclusive, established differentials over the increased rates from New Orleans, La., shall be maintained.
3. From points in the States south of the Ohio River and east of the Mississippi River, also from points in the States of Louisiana and Texas rates shall be increased by the following amounts less the amount of any advance made in such rates since June 1st, 1917; to Chicago, Ill., twenty-two (22) cents per 100 pounds; to St. Louis, Mo., twenty-seven and one-half (27½) cents per 100 pounds; to other points west of the Indiana-Illinois State line and west of the Mississippi River, except points in Arkansas, Louisiana, and Texas, twenty-two (22) cents per 100 pounds; to points on and north of the Ohio River and east of the Indiana-Illinois State line rates shall be increased to maintain the former established relation to the rates from the same points of origin to Chicago, Ill., and St. Louis, Mo.



4. From producing points in Colorado, Wyoming, Montana, Kansas, and Nebraska to Missouri River territory and points in Arkansas, Oklahoma, Louisiana, and Texas and points east thereof twenty-two (22) cents per 100 pounds.
5. From points in Idaho and Utah to points named in paragraph (4) rates shall be fifteen (15) cents above the rates from eastern Colorado.

*Commodities.*

Sugar—Continued

*Increases.*

6. From points in California and Oregon to points taking Missouri River rates and points related thereto under the Commission's Fourth Section Orders, and to points east of the Missouri River, twenty-two (22) cents per 100 pounds.

Paragraph (b) of section 2 is amended to read as follows:

(b) Commodity rates, both interstate and intrastate, not included in the foregoing list shall be increased twenty-five (25) per cent.

Paragraph (a) of section 4 is amended to read as follows:

(a) All intrastate rates and all rates for transportation by water, which are to be increased under this order, if not now on file shall be immediately filed with the Interstate Commerce Commission. Such intrastate rates shall not be applied on interstate shipments and the schedules containing said rates shall be so restricted.

Paragraph (b) of section 5 is amended to read as follows:

(b) The minimum charge for a line haul of a carload shipment shall be fifteen dollars, except that on brick, cement, coal, coke, logs, ore, sand, and gravel, and stone (broken, crushed, and ground) the existing rates as increased under section 2 of this order shall apply.

Section 20 is amended to read as follows:

The rates, fares, and charges to be increased under this order are those existing on May 25, 1918, including changes theretofore published but not then effective and not under suspension, except where the Interstate Commerce Commission prior to May 25, 1918, authorized or prescribed rates, fares, and charges which shall have been published after May 25, 1918, and previous to June 15, 1918, the increases herein prescribed shall apply thereto. Such authorized or prescribed rates, fares, and charges not so published shall be subsequently revised when published by applying the increases prescribed herein.

Section 21 is amended to read as follows:

(a) All schedules, viz, tariffs and supplements, covering passenger fares and baggage charges published under the provisions of this order shall bear on the title-page the following in bold-face type:

The fares<sup>1</sup> made effective by this schedule are initiated by the President of the United States through the Director General, United States Railroad Administration, and apply to both interstate and intrastate traffic.

This schedule is published and filed on one day's notice with the Interstate Commerce Commission under General Order No. 28 of the Director General, United States Railroad Administration, dated May 25, 1918.

(b) All schedules, viz, tariffs and supplements, published to cover freight rates under the provisions of this order shall bear on the title-page one of the legends shown below in bold-face type:

If all rates therein are to be restricted to apply on intrastate traffic only, use the following:

The rates made effective by this schedule are initiated by the President of the United States through the Director General, United States Railroad Administration, and apply to intrastate traffic only.

This schedule is published and filed on one day's notice with the Interstate Commerce Commission under General Order No. 28 of the Director General, United States Railroad Administration, dated May 25, 1918, and amended June 12, 1918.

If all rates therein are to apply on interstate traffic only, use the following:

The rates made effective by this schedule are initiated by the President of the United States through the Director General, United States Railroad Administration, and apply to interstate traffic only.

This schedule is published and filed on one day's notice with the Interstate Commerce Commission under General Order No. 28 of the Director General, United States Railroad Administration, dated May 25, 1918, and amended June 12, 1918.

If all rates therein are to apply on both intrastate and interstate traffic, use the following:

The rates made effective by this schedule are initiated by the President of the United States through the Director General, United States Railroad Administration, and apply to both interstate and intrastate traffic.

This schedule is published and filed on one day's notice with the Interstate Commerce Commission under General Order No. 28 of the Director General, United States Railroad Administration, dated May 25, 1918, and amended June 12, 1918.

If some of the rates therein are to apply to interstate traffic and others to intrastate traffic, use the following:

The rates made effective by this schedule are initiated by the President of the United States through the Director General, United States Railroad Administration, and apply to interstate or intrastate traffic, as provided herein.

This schedule is published and filed on one day's notice with the Interstate Commerce Commission under General Order No. 28 of the Director General, United States Railroad Administration, dated May 25, 1918, and amended June 12, 1918.

Given under my hand this the 12th day of June, 1918.

W. G. McAdoo,  
*Director General of Railroads.*

#### GENERAL ORDER NO. 29.

UNITED STATES RAILROAD ADMINISTRATION.

W. G. McAdoo, Director General.

Washington, May 31, 1918.

Whereas certain of the railroads now under control of the Director General have in existence at this time agreements with the International Association of Machinists, International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, International Brotherhood of Blacksmiths and Helpers, Brotherhood Railway Car-

men of America, Amalgamated Sheet Metal Workers' International Alliance, and International Brotherhood of Electrical Workers which provide for basis of compensation and regulations of employment; and

Whereas in existing circumstances it is the patriotic duty of both officers and employees of the railroads under Federal control, especially during the present war, promptly and equitably to adjust any controversies which may arise, thereby eliminating misunderstandings which tend to lessen the efficiency of the service:

*It is hereby ordered,* That the basis arrived at in the annexed understanding between Messrs. A. H. Smith, C. H. Markham, and R. H. Aishton, regional directors, representing the railroads in the eastern, southern, and western territories, which now have, or may hereafter have such schedules or agreements with the chief executive officers of the International Association of Machinists, International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, International Brotherhood of Blacksmiths and Helpers, Brotherhood Railway Carmen of America, Amalgamated Sheet Metal Workers' International Alliance, and International Brotherhood of Electrical Workers be, and the same is hereby, adopted and put into effect as of May 31, 1918.

W. G. McADOO,

*Director General of Railroads.*

*Memorandum of an Understanding Between Messrs. A. H. Smith, C. H. Markham, and R. H. Aishton, Regional Directors, representing the railroads in their respective regions, and Mr. A. O. Wharton, president Railway Employees Department; Mr. J. F. Anderson, acting president International Association of Machinists; Mr. Louis Weyand, acting president International Brotherhood of Boiler Makers, Iron Ship Builders and Helpers of America; Mr. G. C. Van Dornes, acting president International Brotherhood of Blacksmiths and Helpers; Mr. F. H. Knight, acting president Brotherhood of Railway Carmen of America; Mr. Otto E. Hoard, acting president Amalgamated Sheet Metal Workers' International Alliance; Mr. Frank J. McNulty, president International Brotherhood of Electrical Workers.*

It is understood that all controversies growing out of the interpretation or application of the provisions of the wage schedules or agreements which are not promptly adjusted by the officials and the employees on any one of the railroads operated by the Government shall be disposed of in the following manner:

1. There shall be at once created a commission, to be known as Railway Board of Adjustment No. 2, to consist of 12 members, 6 to be selected by the said regional directors and compensated by the railroads, and one each by the chief executive officer of each of the six organizations of employees hereinbefore named and compensated by such organizations.

2. This Board of Adjustment, No. 2, shall meet in the city of Washington within 10 days after the selection of its members and

elect a chairman and vice chairman, who shall be members of the board. The chairman or vice chairman will preside at meetings of the board, and both will be required to vote upon the adoption of all decisions of the board.

3. The board shall meet regularly at stated times each month and continue in session until all matters before it are considered.

4. Unless otherwise mutually agreed, all meetings of the board shall be held in the city of Washington: *Provided*, That the board shall have authority to empower two or more of its members to conduct hearings and pass upon controversies when properly submitted at any place designated by the board: *Provided further*, That such subdivision of the board will not be authorized to make final decision. All decisions shall be made and approved by the entire board, as herein provided.

5. Should a vacancy occur in the board for any cause, such vacancies shall be immediately filled by the same appointive authority which made the original selection.

6. (Article 6 left blank in this memorandum because article 6 for Railway Board of Adjustment No. 1 refers to matters pertaining to the Commission of Eight. In order that all other articles in this Memorandum of Understanding may bear the same numbers as similar articles for Railway Board of Adjustment No. 1, article No. 6 has been left blank.)

7. The Board of Adjustment No. 2 shall render decisions on all matters in dispute as provided in the preamble hereof and when properly submitted to the board.

8. The broad question of wages and hours will be considered by the Railroad Wage Commission, but matters of controversies arising from interpretations of wage agreements, not including matters passed upon by the Railroad Wage Commission, shall be decided by the Railway Board of Adjustment No. 2, when properly presented to it.

9. Wages and hours, when fixed by the Director General, shall be incorporated into existing agreements on the several railroads, and should differences arise between the management of the employees of any of the railroads as to such incorporation, such questions of difference shall be decided by the Railway Board of Adjustment No. 2, when properly presented, subject always to review by the Director General.

10. Personal grievances or controversies arising under interpretation of wage agreements, and all other disputes arising between officials of a railroad and its employees, covered by this understanding, will be handled in their usual manner by general committees of the employees up to and including the chief operating officer of the railroad (or some one officially designated by him), when, if an agreement is not reached, the chairman of the general committee of employees may refer the matter to the chief executive officer of the organization concerned, and if the contention of the employees' committee is approved by such executive officer, then the chief operating officer of the railroad and the chief executive officer of the organization concerned shall refer the matter, with all supporting papers, to

the Director of the Division of Labor of the United States Railroad Administration, who will in turn present the case to the Railway Board of Adjustment No. 2, which board shall promptly hear and decide the case, giving due notice to the chief operating officer of the railroad interested and to the chief executive officer of the organization concerned of the time set for hearing.

11. No matter will be considered by the Railway Board of Adjustment No. 2, unless officially referred to it in the manner herein prescribed.

12. In hearings before the Railway Board of Adjustment No. 2, in matters properly submitted for its consideration, the railroad shall be represented by such person or persons as may be designated by the chief operating officer, and the employees shall be represented by such person or persons as may be designated by the chief executive officer of the organization concerned.

13. All clerical and office expense will be paid by the United States Railroad Administration. The railroad directly concerned and the organization involved in a hearing will, respectively, assume any expense incurred in presenting a case.

14. In each case an effort should be made to present a joint concrete statement of facts as to any controversies, but the board is fully authorized to require information in addition to the concrete statement of facts, and may call upon the chief operating officer of the railroad or the chief executive officer of the organization concerned for additional evidence, either oral or written.

15. All decisions of the Railway Board of Adjustment No. 2 shall be approved by a majority vote of all members of the board.

16. After a matter has been considered by the board, and in the event a majority vote can not be obtained, then any six members of the board may elect to refer the matter upon which no decision has been reached to the Director General of Railroads for a final decision.

17. The Railway Board of Adjustment No. 2, shall keep a complete and accurate record of all matters submitted for its consideration and of all decisions made by the board.

18. A report of all cases decided, including the decision, will be filed with the Director, Division of Labor of the United States Railroad Administration, with the chief operating officer of the railroad affected, the several regional directors, and with the chief executive officers of the organizations concerned.

19. This understanding shall become effective upon its approval by the Director General of Railroads and shall remain in full force and effective during the period of the present war, and thereafter, unless a majority of the regional directors, on the one hand, as representing the railroads, or a majority of the chief executive officers of the organizations, on the other hand, as representing the employees, shall desire to terminate the same, which can, in these circumstances, be done on thirty (30) days' formal notice, or shall be

terminated by the Director General himself, at his discretion, on thirty (30) days' formal notice.

A. H. SMITH,  
C. H. MARKHAM,  
R. H. AISHTON,

*Regional Directors for the Railroads under Government Control.*

A. O. WHARTON,  
*President Railway Employees' Department.*

J. F. ANDERSON,  
*Acting President International Association of Machinists.*

LOUIS WEYAND,  
*Acting President International Brotherhood of Boiler  
Makers, Iron Ship Builders and Helpers of America.*

G. C. VAN DOERNES,  
*Acting President International Brotherhood  
of Blacksmiths and Helpers.*

F. H. KNIGHT,  
*Acting President Brotherhood Railway Carmen of America.*

OTTO E. HOARD,  
*Acting President Amalgamated Sheet Metal Workers'  
International Alliance.*

FRANK J. McNULTY,  
*President International Brotherhood of Electrical Workers.*

NOTE.—The foregoing Memorandum of an Understanding has been signed for certain of the organizations by "acting president." This was made necessary by the inability of the presidents of these organizations to be present in person. The signatures of the acting presidents have been properly authorized and are accepted by the organizations as though signed by the presidents.

Approved.

W. G. McADOO,  
*Director General of Railroads.*

#### GENERAL ORDER NO. 30.

UNITED STATES RAILROAD ADMINISTRATION.

Office of the Director General.

Washington, June 12, 1918.

#### Settlement of Inter-road Bills and Accounts.

Effective July 1, 1918, the following regulations shall govern the settlement of all inter-road bills, statements, and accounts rendered by one carrier under Federal control against or for account of another carrier under such control.

- (1) Settlements by vouchers and the drawing of drafts in settlement of individual inter-road bills, statements, and accounts rendered by one carrier under Federal control against another carrier under such control, except as provided for in paragraph (2) hereof, shall be discontinued.
- (2) The regulations herein prescribed shall not include:
  - (a) Settlement of accounts between a carrier under Federal control and a carrier not under such control.

- (b) Settlement of accounts between carriers under Federal control for transactions which do not properly belong on the Federal books of either carrier interested.
- (3) Each bill, statement, or account made and rendered by one carrier under Federal control against or in favor of another carrier under such control, and forwarded on and after July 1, 1918, shall be plainly stamped on the face thereof, as follows. "Included in settlement, month of ..... 19—". Such stamp shall indicate the month in which the amount represented by the account will be included for settlement by the carrier rendering the account, and it shall be included in the same month's settlement account by the receiving carrier. No such bill, statement, or account made and rendered in one month shall be back-dated for a prior month.
- (4) On the first of each month each carrier shall prepare and render each other carrier with which it has inter-road transactions, as a basis for a settlement for the month just ended, a statement of debts and credits, in abstracts, showing the nature and total of each bill, statement, or account forwarded by it to each other carrier during the preceding month.
- (5) There shall be opened as of July 1, 1918, on the Federal books of each carrier, a clearance or settlement account with each other carrier under Federal control with which it has inter-road transactions.
- (6) As inter-road bills, statements, or accounts are made and rendered they shall be charged or credited as the case may be, through the clearance or settlement account prescribed in the preceding paragraph.
- (7) As inter-road bills, statements, or accounts are received they shall be:
- (a) Examined as to correctness, as prescribed in General Order No. 20;
  - (b) Charged or credited to the appropriate operating or other account;
  - (c) Credited or charged (as the case may be) by the receiving carrier to the carrier originating the account through the appropriate clearance or settlement account prescribed in paragraph (5) hereof.
- (8) The total of each statement for a given month shall be accepted as rendered, and on or before the fifteenth day of each month subsequent to that for which such statement was rendered the creditor carrier shall draw upon the debtor carrier for the balance between the two statements exchanged by them.
- (9) In the event the statement referred to in paragraph (4) indicates that the originating carrier has charged or credited the other carrier with a bill, statement, or account which has not been received, the carrier to which the statement is rendered shall accept the account and credit or debit the originating carrier therewith to the debit or credit of a suspense account.

Such receiving carrier shall immediately take the matter up with the originating carrier for the purpose of locating the missing bill, statement, or account. If it be found that such amount was included in the statement in error, adjustment shall be made therefor in a subsequent statement. If manifest errors be found in such statements by a receiving carrier, the attention of the originating carrier shall be called thereto and such error or errors shall be adjusted in the statement for the subsequent month.

W. G. McAdoo,  
Director General of Railroads.

GENERAL ORDER NO. 31.

UNITED STATES RAILROAD ADMINISTRATION  
Office of the Director General

Washington, D. C., June 12, 1918.

Effective July 1, 1918, the following rules and regulations shall govern the accounting for the use of equipment or facilities of one carrier under Federal control by or for the account of another carrier under such control, provided, nothing herein contained shall be construed to warrant the discontinuance of the keeping, rendition and settlement of such accounts by a carrier under Federal control in favor of or against a carrier not under Federal control, in the same manner as heretofore.

I. Hire of Freight and Passenger Train Equipment.

1. The practice of recording, computing and paying per diem, mileage, or rental for the use of freight and passenger train cars of one carrier under Federal control by or for account of another carrier under Federal control, and the adjustment of differences, reclaims, etc., between such carriers which clearly relate to transactions incurred on or after January 1, 1918, shall be discontinued.
2. Junction cards, interchange reports, location records, and all other records and reports necessary to determine the location of equipment shall be kept, rendered, and compiled as heretofore.

II. Joint Facilities—Bills for Use of.

3. Effective with costs incurred on and after July 1, 1918, bills rendered by one carrier under Federal control against another carrier under such control for maintaining and operating (including taxes and rental) tracks, yards, terminals and other facilities, including costs to operate equipment used therein, shall be computed, rendered, charged and paid on the following bases.
  - (a) In cases where the tenancy is not changed under Government operations: The total cost of maintenance, operation, taxes and rental, as provided for under existing agreements, and the amounts thereof borne by each user, for a period not less than six months ended December 31, 1917, shall be determined by the owning or operating carrier. From such



costs, the percentage of the total borne by each user to the total costs shall be determined. The percentages thus determined shall be applied monthly to the total costs incurred on and after July 1, 1918, and bills shall be rendered and paid on the results thus obtained.

- (b) In cases where tenants or users are admitted to facilities not heretofore jointly used: Federal Managers of the facilities to be jointly used shall determine, as between themselves, a fair and equitable arbitrary basis for the apportionment of the total costs of maintenance, operation, taxes and rental which should be paid by each tenant. Such basis shall thereafter during the period of Federal control be used by the owning carrier as a basis for preparation and rendition of bills against the tenants or users, and such tenants or users shall pay such bills as rendered.
- (c) In cases where the number of tenants or users of facilities now used by tenants under agreements with owners is increased or decreased: The literal compliance with the terms of such agreements shall be temporarily suspended, for the period of Federal control, and a fair and equitable basis of use shall be determined as prescribed in paragraph (b) preceding, except that due regard shall be given to the terms of existing agreements in fixing such arbitrary basis.
- (b) In cases where a lump sum charge has been made by an owning or operating carrier which is under Federal Control for the use of a facility used by another carrier which is under such control, such bills for the lump sum charge shall be rendered and paid during Federal control as heretofore; provided, however, if there be a change in such tenancy by the admittance of other tenants or otherwise, and the contractual basis upon which the lump sum charge is made be disturbed thereby, an arbitrary basis of charge by the owner against the tenant or tenants shall be determined as prescribed in paragraph (b) hereof.
- 4. Details therefore required in support of joint facilities, bills, statements and accounts shall be discontinued, except that such bills shall show the totals chargeable and creditable, to the primary operating revenue, expense, tax and rental accounts prescribed by the Interstate Commerce Commission, or which may hereafter be prescribed.
- 5. If materials and supplies, the value of which is carried in the accounts of one carrier under Federal control be used by another carrier under such control for maintaining or operating equipment or facilities jointly used, the value at which such materials and supplies are carried in the accounts of the carrier furnishing them shall be billed against and paid for by the carrier using them as heretofore, except that percentages for overheads and other carrying expenses shall not be added to the cost thereof.

W. G. McAdoo,  
Director General of Railroads.

ADDENDUM TO SUPPLEMENT NO. 4 TO GENERAL ORDER NO. 27.  
UNITED STATES RAILROAD ADMINISTRATION.  
W. G. McAdoo, Director General of Railroads.

Washington, D. C., September 1, 1918.

Effective September 1, 1918, superseding General Order No. 27 and in lieu thereof, as to the employees herein named, the following rates of pay and rules for coach cleaners are hereby ordered:

ARTICLE I.

RATES OF PAY.

(a) For coach cleaners who were on January 1, 1918, prior to the application of General Order No. 27, receiving less than sixteen (16) cents per hour, establish a basic minimum rate of sixteen (16) cents per hour, to this basic minimum rate and all hourly rates of sixteen (16) cents and above, add twelve (12) cents per hour, establishing a minimum rate of twenty-eight (28) cents per hour, provided that the maximum shall not exceed forty (40) cents per hour.

(b) All coach cleaners shall be paid on the hourly basis.

ARTICLE II.

PRESERVATION OF RATES.

(a) The minimum rates and all rates in excess thereof, as herein established, and higher rates which have been authorized since January 1, 1918, except by General Order No. 27, shall be preserved.

(b) Coach cleaners temporarily or permanently assigned to higher-rated positions shall receive the higher rates while occupying such positions; coach cleaners temporarily assigned to lower-rated positions shall not have their rates reduced.

ARTICLE III.

HOURS OF SERVICE.

Eight consecutive hours, exclusive of the meal period, shall constitute a day's work.

ARTICLE IV.

OVERTIME.

(a) Where there is no existing agreement or practice more favorable to the employees, overtime will be computed for the ninth and tenth hour of continuous service, pro rata on the actual minute basis, and thereafter at the rate of time and one-half time. Even hours will be paid for at the end of each pay period; fractions thereof will be carried forward.

(b) Coach cleaners will not be required to suspend work during regular hours to absorb overtime.

ARTICLE V.

APPLICATION.

The rates of pay and rules herein established shall be incorporated into existing agreements on the several railroads.

W. G. McAdoo,  
Director General of Railroads.

SUPPLEMENT NO. 5 TO GENERAL ORDER NO. 27.

UNITED STATES RAILROAD ADMINISTRATION.

W. G. McAdoo, Director General of Railroads.

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Washington, D. C., August 9, 1918.

Effective August 1, 1918, the wages, hours and other conditions of employment of employees of the Operating Department of the Pullman Company will be the same as those fixed in Supplement No. 4 to General Order No. 27 for corresponding classes of railroad employees, but none of the provisions named therein will be retroactive prior to August 1, 1918.

W. G. McAdoo,  
Director General of Railroads.

SUPPLEMENT NO. 6 TO GENERAL ORDER NO. 27.

UNITED STATES RAILROAD ADMINISTRATION.

W. G. McAdoo, Director General of Railroads.

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Washington, D. C., August 30, 1918.

In General Order No. 27 and supplements thereto, and in certain memoranda of understanding creating Railway Boards of Adjustment put in effect by General Orders No. 13 and No. 29, methods have been provided for interpretation of wage orders issued by the Director General upon recommendations of such boards and the Division of Labor, "subject always to review by the Director General." For the purpose of affording prompt interpretations of all wage orders issued by the Director General, the duties and authority of the Board of Railroad Wages and Working Conditions are hereby extended to include investigations and recommendations to the Director General of interpretations of all such wage orders, when requested to do so by the Director of the Division of Labor.

It should be understood by railroad employees that it is impracticable to give interpretation on exparte statement, to the thousands who request information as to the manner in which wage orders should be applied in individual cases. Operating officials of the railroads are required to place wage orders in effect fairly and equitably, and should differences of opinion arise necessitating a formal interpretation, the matter will be disposed of in the following manner:

When a wage order is placed in effect in a manner with which an employee, or the employee's committee disagrees, a joint statement quoting the language of the wage order, and including the contentions of employees and the contentions of officials, signed by the represent-

atives of the employees and the officials, will be transmitted to the Director of Labor, who will record and transmit same to the Board of Railroad Wages and Working Conditions, which will promptly investigate and make recommendation to the Director General. Upon the receipt of interpretation from the Director General, the Director of Labor will transmit such interpretation to the Railway Boards of Adjustment for their information and guidance, in the application of such interpretation to existing conditions, or to questions arising from the incorporation of the order as so interpreted into existing agreements on all railroads under Federal control. As occasion demands, all interpretations will be printed and given general publicity, for the purpose of communicating the information to all concerned, and thus avoiding the necessity of duplication of interpretations.

On and after September 1st, 1918, any disagreement between the employees and the officials, over the application of any wage order, will be submitted to the Director of Labor, as outlined above, but in order promptly to dispose of all requests for interpretations previously presented to the Division of Labor, or to the Boards of Adjustment, such requests will be immediately recorded and transmitted to the Board of Railroad Wages and Working Conditions by the Director of Labor.

Nothing herein contained revokes authority granted to the Division of Labor of Railway Boards of Adjustment in determining disputes arising in connection with the application of interpretations of wage orders to existing conditions, or in connection with the incorporation of such interpretations into existing agreements.

W. G. McADOO,  
Director General of Railroads.

#### SUPPLEMENT NO. 7 TO GENERAL ORDER NO. 27.

UNITED STATES RAILROAD ADMINISTRATION.

W. G. McADOO, Director General of Railroads.

Washington, D. C., September 1, 1918.

Effective September 1, 1918, superseding General Order No. 27, and in lieu thereof, as to the employees herein named, the following rates of pay and rules for overtime and working conditions for all clerical forces in all departments, and for certain employees in stations, storage or terminal warehouses, docks, storehouses, shops, and yards, upon railroads under Federal control, are hereby ordered:

#### ARTICLE I.

##### RATES OF PAY.

(a) For all employees who devote a majority of their time to clerical work of any description, including train announcers, gate-men, checkers, baggage and parcel room employees, train and engine crew callers, and the operators of all office or station equipment devices (excepting such as come within the scope of existing agreements or those hereafter negotiated with the railroad telegraphers),

establish a basic minimum rate of sixty-two dollars and fifty cents (\$62.50) per month; and to this basic minimum rate and all rates of sixty-two dollars and fifty cents (\$62.50) and above, in effect as of January 1, 1918, prior to the application of General Order No. 27, add twenty-five (25) dollars per month, establishing a minimum rate of eighty-seven dollars and fifty cents (\$87.50) per month.

(b) This order shall apply to chief clerks, foremen, subforemen, and other similar supervisory forces of employees herein provided for.

(c) For office boys, messengers, chore boys, and other employees under eighteen (18) years of age filling similar positions, and station attendants, establish a basic minimum rate of twenty (20) dollars per month, and to this basic minimum rate and all rates of twenty (20) dollars per month and above, in effect as of January 1, 1918, prior to the application of General Order No. 27, add twenty-five (25) dollars per month, establishing a minimum rate of forty-five (45) dollars per month.

(d) For all other employees not otherwise classified, such as janitors, elevator and telephone switchboard operators, office, station, and warehouse watchmen, establish a basic minimum rate of forty-five (45) dollars per month, and to this basic minimum rate and all rates of forty-five (45) dollars per month and above, in effect as of January 1, 1918, prior to the application of the General Order No. 27, add twenty-five (25) dollars per month, establishing a minimum rate of seventy (70) dollars per month.

(e) The same increases provided for in sections (a), (b), (c), and (d) of this article, shall apply to employees named therein paid on any other basis.

(f) The wages for new positions shall be in conformity with the wage for positions of similar kind or class where created.

## ARTICLE II.

### STATIONARY ENGINEERS (STEAM), FIREMEN, AND POWER-HOUSE OILERS.

(a) For all stationary engineers (steam), establish a basic minimum rate of eighty-five (85) dollars per month, and to this basic minimum rate, and all rates of eighty-five (85) dollars and above, in effect as to January 1, 1918, prior to the application of General Order No. 27, add twenty-five (25) dollars per month, establishing a minimum rate of one hundred ten (110) dollars per month.

(b) This order shall apply to chief stationary engineers.

(c) For all stationary firemen and power-house oilers, establish a basic minimum rate of sixty-five (65) dollars per month, and to this basic minimum rate, and all rates of sixty-five (65) dollars and above, in effect as of January 1, 1918, prior to the application of General Order No. 27, add twenty-five (25) dollars per month, establishing a minimum rate of ninety (90) dollars per month.

## ARTICLE III.

## LOCOMOTIVE BOILER WASHERS.

For all locomotive boiler washers who were on January 1, 1918, prior to the application of General Order No. 27, receiving less than twenty-six (26) cents per hour, establish a basic minimum rate of twenty-six (26) cents per hour, and to this basic minimum rate, and all hourly rates of twenty-six (26) cents, and above, add 12 (12) cents per hour, establishing a minimum rate of thirty-eight (38) cents per hour, provided that the maximum shall not exceed fifty (50) cents per hour.

## ARTICLE IV.

## POWER TRANSFER AND TURNABLE OPERATORS.

For all operators of power-driven transfer and turntables who were on January 1, 1918, prior to the application of General Order No. 27, receiving less than twenty-one (21) cents per hour, establish a basic minimum rate of twenty-one (21) cents per hour, and to this basic minimum rate, and all hourly rates of twenty-one (21) cents and above, add twelve (12) cents per hour, establishing a minimum rate of thirty-three (33) cents per hour, provided that the maximum shall not exceed forty-five (45) cents per hour.

## ARTICLE V.

## SHOP, ROUNDHOUSE, STATION, STOREHOUSE, AND WAREHOUSE EMPLOYEES.

## (EXCEPT EMPLOYEES PROVIDED FOR IN HARBOR AWARDS.)

(a) For all laborers employed in and around shops, roundhouses, stations, storehouses, and warehouses (except employees provided for in harbor awards), such as engine watchmen and wipers, fire builders, ash-pit men, boiler washer helpers, flue borers, truckers, stowers, shippers, coal passers, coal-chute men, etc., who were on January 1, 1918, prior to the application of General Order No. 27, receiving less than nineteen (19) cents per hour, establish a basic minimum rate of nineteen (19) cents per hour, and to this basic minimum rate, and all hourly rates of nineteen (19) cents and above, add twelve (12) cents per hour, establishing a minimum rate of thirty-one (31) cents per hour, provided that the maximum shall not exceed forty-three (43) cents per hour.

(b) For all common labor in the departments herein referred to and not otherwise provided for, who were on January 1, 1918, prior to the application of General Order No. 27, receiving less than sixteen (16) cents per hour, establish a basic minimum rate of sixteen (16) cents per hour, and to this basic minimum rate and all hourly rates of sixteen (16) cents and above, add twelve (12) cents per hour, establishing a minimum rate of twenty-eight (28) cents per hour, provided that the maximum shall not exceed forty (40) cents per hour.

## ARTICLE VI.

## MONTHLY, WEEKLY, OR DAILY RATES.

For all monthly, weekly, or daily rated employees in the departments herein referred to and not otherwise provided for, increase the rates in effect as of January 1, 1918, prior to the application of General Order No. 27, on the basis of twenty-five (25) dollars per month.

## ARTICLE VII.

## MAXIMUM MONTHLY WAGE.

No part of the increases provided for in this order shall apply to establish a salary in excess of two hundred fifty (250) dollars per month.

## PRESERVATION OF RATES.

(a) The minimum rates, and all rates in excess thereof, as herein established, and higher rates which have been authorized since January 1, 1918, except by General Order No. 27, shall be preserved.

(b) Employees temporarily or permanently assigned to higher-rated positions shall receive the higher rates while occupying such positions; employees temporarily assigned to lower-rated positions shall not have their rates reduced.

## ARTICLE IX.

## EXCEPTION.

The provisions of this order will not apply in cases where amounts less than thirty (30) dollars per month are paid to individuals for special service which only takes a portion of their time from outside employment or business.

## ARTICLE X.

## HOURS OF SERVICE.

Eight (8) consecutive hours, exclusive of the meal period, shall constitute a day's work.

## ARTICLE XI.

## OVERTIME AND CALLS.

(a) Where there is no existing agreement or practice more favorable to the employees, overtime shall be computed for the ninth and tenth hour of continuous service, pro rata on the actual minute basis, and thereafter at the rate of time and one-half time. Even hours will be paid for at the end of each pay period; fractions thereof will be carried forward.

(b) When notified or called to work, outside of established hours, employees will be paid a minimum allowance of three hours.

(c) Employees will not be required to suspend work during regular hours to absorb overtime.

## ARTICLE XII.

## PROMOTION AND SENIORITY.

(a) Promotions shall be based on ability, merit, and seniority; ability and merit being sufficient, seniority shall prevail, except, however, that this provision shall not apply to the personal office forces, of such officers as superintendent, train master, division engineer, master mechanic, general freight or passenger agent, or their superiors in rank and executive officers. The management shall be the judge, subject to an appeal, as provided in Article XIII.

(b) Seniority will be restricted to each classified department of the general and other offices and of each superintendent's or master mechanic's division.

(c) Seniority rights of employees referred to herein, to:

(1) New positions,

(2) Vacancies will be governed by paragraphs (a) and (b) of this article.

(d) Employees declining promotion shall not lose their seniority.

(e) Employees accepting promotion will be allowed thirty (30) days in which to qualify, and failing, will be returned to former position without loss of seniority.

(f) New positions or vacancies will be promptly bulletined for a period of five (5) days in the departments where they occur. Employees desiring such positions will file their applications with the designated official within that time, and an appointment will be made within ten (10) days thereafter. Such position or vacancy may be filled temporarily pending an assignment. The name of the appointee will immediately thereafter be posted where the position or vacancy was bulletined.

(g) In reducing forces, seniority shall govern. When forces are increased, employees will be returned to the service and positions formerly occupied, in the order of their seniority. Employees desiring to avail themselves of this rule must file their names and addresses with the proper official. Employees failing to report for duty or give satisfactory reason for not doing so within seven days from date of notification will be considered out of the service.

(h) A seniority roster of all employees in each classified department, who have been in the service six (6) months or more, showing name, date of entering the service, and the date of each promotion or change, will be posted in a place accessible to those affected.

(i) The roster will be revised and posted in January of each year, and shall be open to correction for a period of sixty (60) days from date of posting, on presentation of proof of error by an employee or his representative. The duly accredited representative of the employee shall be furnished with a copy of roster upon written request.

## ARTICLE XIII.

## DISCIPLINE AND GRIEVANCES.

(a) An employee disciplined, or who considers himself unjustly treated, shall have a fair and impartial hearing, provided written re-



quest is presented to his immediate superior within five (5) days of the date of the advice of discipline, and the hearing shall be granted within five (5) days thereafter.

(b) A decision will be rendered within seven (7) days after the completion of hearing. If an appeal is taken, it must be filed with the next higher official and a copy furnished the official whose decision is appealed within five (5) days after date of decision. The hearing and decision on the appeal shall be governed by the time limits of the preceding section.

(c) At the hearing or on the appeal, the employee may be assisted by a committee of employees, or by one or more duly accredited representatives.

(d) The right of appeal by employees or representatives, in regular order of succession and in the manner prescribed up to and inclusive of the highest official designated by the railroad, to whom appeals may be made, is hereby established.

(e) An employee on request will be given a letter, stating the cause of discipline. A transcript of evidence taken at the investigation or on the appeal will be furnished on request to the employee or representative.

(f) If the final decision decrees that charges against the employee were not sustained, the record shall be cleared of the charge; if suspended or dismissed, the employee shall be returned to former position and paid for all time lost.

(g) Committees of employees shall be granted leave of absence and free transportation for the adjustment of differences between the railroad and the employees.

#### ARTICLE XIV.

##### RULES FOR APPLICATION OF THIS ORDER.

(a) It is not the intention of this order to change the number of days per month for monthly paid employees. The increases per month provided for herein shall apply to the same number of days per month which were worked as of January 1, 1918.

(b) The pay of female employees, for the same class of work, shall be the same as that of men, and their working conditions must be healthful and fitted to their needs. The laws enacted for the government of their employment must be observed.

##### INTERPRETATION OF THIS ORDER.

The rates of pay and rules herein established shall be incorporated into existing agreements and into agreements which may be reached in the future, on the several railroads; and should differences arise between the management and the employees of any of the railroads as to such incorporation, intent, or application of this order prior to the creation of additional railway boards of adjustment, such questions of difference shall be referred to the Director of the Division of Labor for decision, when properly presented, subject always to review by the Director General.

Agreements or practices, except as changed by this order, remain in effect.

W. G. McAdoo,  
Director General of Railroads.

SUPPLEMENT NO. 8 TO GENERAL ORDER NO. 27.

UNITED STATES RAILROAD ADMINISTRATION.  
W. G. McAdoo, Director General of Railroads.

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Washington, D. C., September 1, 1918.

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Effective September 1, 1918, superseding General Order 27, and in lieu thereof, as to the employees herein named, the following rates of pay and rules for overtime and working conditions for all employees in the Maintenance of Way Department (except mechanics and helpers where provided for in Supplement No. 4, General Order No. 27, and clerical forces), upon railroads under Federal control are hereby ordered:

ARTICLE I.

RATES OF PAY.

(a) For all building, bridge, painter, signal and construction, mason and concrete, water supply, maintainer, and plumber foremen, establish a basic minimum rate of ninety (90) dollars per month, and to this basic minimum rate and all rates of ninety (90) dollars per month and above, in effect as of January 1, 1918, prior to the application of General Order No. 27, add twenty-five (25) dollars per month, establishing a minimum rate of one hundred fifteen (115) dollars per month.

(b) For all assistant building, bridge, painter, signal and construction, mason and concrete, water supply, maintainer, and plumber foremen, and for coal wharf, coal chute, and fence gang foremen; pile driver, ditching and holsting engineers, and bridge inspectors, establish a basic minimum rate of eighty (80) dollars per month, and to this basic minimum rate and all rates of eighty (80) dollars per month and above, in effect as of January 1, 1918, prior to the application of General Order No. 27, add twenty-five (25) dollars per month, establishing a minimum rate of one hundred five (105) dollars per month.

(c) For all track foremen, establish a basic minimum rate of seventy-five (75) dollars per month, and to this basic minimum rate and all rates of seventy-five (75) dollars per month and above, in effect as of January 1, 1918, prior to the application of General Order No. 27, add twenty-five (25) dollars per month, establishing a minimum rate of one hundred (100) dollars per month.

(d) Rates of pay for all assistant track foremen will be (5) cents per hour in excess of the rate paid laborers whom they supervise.

(e) For all mechanics in the Maintenance of Way and Bridge and Building Departments, where not provided for in Supplement No. 4 to General Order No. 27, who were on January 1, 1918, prior to the application of General Order No. 27, receiving less than forty (40) cents per hour, establish a basic minimum rate of forty (40) cents per hour, and to this basic minimum rate and all rates of forty (40) cents per hour and above add thirteen (13) cents per hour, establishing a minimum rate of fifty-three (53) cents per hour.

(f) For helpers to all mechanics in the Maintenance of Way and Bridge and Building Departments, where not provided for in Supplement No. 4 to General Order No. 27, who were on January 1, 1918, prior to the application of General Order No. 27, receiving less than thirty (30) cents per hour, establish a basic minimum rate of thirty (30) cents per hour, and to this basic minimum rate and all hourly rates of thirty (30) cents per hour and above add thirteen (13) cents per hour, establishing a minimum rate of forty-three (43) cents per hour.

(g) For track laborers and all other classes of maintenance-of-way labor not herein named, who on January 1, 1918, prior to the application of General Order No. 27, were receiving less than sixteen (16) cents per hour, establish a basic minimum rate of sixteen (16) cents per hour, and to this basic minimum rate and all hourly rates of sixteen (16) cents per hour and above add twelve (12) cents per hour, establishing a minimum rate of twenty-eight (28) cents per hour, provided that the maximum shall not exceed forty (40) cents per hour.

(h) For drawbridge tenders and assistants, pile driver, ditching and hoisting firemen, pumper engineers and pumpers, crossing watchmen or flagmen, lamp lighters and tenders, add to the rate in effect as of January 1, 1918, prior to the application of General Order No. 27, twenty-five (25) dollars per month.

(i) The wages for new positions shall be in conformity with the wages for positions of similar kind or class in department where created.

## ARTICLE II.

### MONTHLY, WEEKLY, OR DAILY RATES.

For all monthly, weekly, or daily rated employees in the departments herein referred to, and not otherwise provided for, increase the rates in effect as of January 1, 1918, prior to the application of General Order No. 27 on the basis of twenty-five (25) dollars per month.

## ARTICLE III.

### MAXIMUM MONTHLY RATE.

No part of the increases herein specified shall be applied to establish a salary in excess of two hundred fifty (250) dollars per month.

## ARTICLE IV.

## PRESERVATION OF RATES.

(a) The minimum rates, and all rates in excess thereof, as herein established, and higher rates which have been authorized since January 1, 1918, except by General Order No. 27, shall be preserved.

(b) Employees temporarily or permanently assigned to higher rated positions shall receive the higher rates while occupying such positions; employees temporarily assigned to lower rated positions shall not have their rates reduced.

## ARTICLE V.

## EXCEPTION.

The provisions of this order will not apply in cases where amounts less than thirty (30) dollars per month are paid to individuals for special service which only takes a portion of their time from outside employment or business.

## ARTICLE VI.

## HOURS OF SERVICE.

Eight (8) consecutive hours, exclusive of the meal period, shall constitute a day's work.

## ARTICLE VII.

## OVERTIME AND CALLS.

(a) Where there is no existing agreement or practice more favorable to the employees, overtime shall be computed for the ninth and tenth hour of continuous service, pro rata on the actual minute basis, and thereafter at the rate of time and one-half time. Even hours will be paid for at the end of each pay period; fractions thereof will be carried forward.

(b) When notified or called to work, outside of established hours, employees will be paid a minimum allowance of three (3) hours.

(c) Employees will not be required to suspend work during regular hours to absorb overtime.

## ARTICLE VIII.

## PROMOTION AND SENIORITY RIGHTS.

(a) Promotions shall be based on ability, merit, and seniority. Ability and merit being sufficient, seniority shall prevail. The management shall be the judge, subject to an appeal as provided for in Article IX.

(b) The seniority rights of laborers, as such, will be restricted to their gangs, except where gang is abolished they may displace laborers in other gangs who are junior in service.

(c) Except as provided for in section (b) of this article, the seniority rights of employees referred to herein, to:

(1) New positions,

(2) Vacancies: Will be governed by section (a) of this article, and will be restricted to the maintenance division upon which employed.

(d) Employees declining promotion shall not lose their seniority.

(e) Employees accepting promotion will be allowed thirty (30) days in which to qualify, and failing, will be returned to former position without loss of seniority.

(f) New positions or vacancies will be promptly bulletined for a period of five (5) days at the tool house or in the department where they occur. Employees desiring such positions will file their applications with the designated official within that time, and the appointment will be made within ten (10) days thereafter. Such position or vacancy may be filled temporarily pending assignment. The name of the appointee will immediately thereafter be posted where the position or vacancy was bulletined.

(g) In reducing forces, seniority shall govern; foremen will displace other foremen who are their junior in service before displacing laborers. When forces are increased, employees will be returned to the service and positions formerly occupied in the order of their failing to report for duty or to give satisfactory reason for not doing seniority. Employees desiring to avail themselves of this rule must file their names and addresses with the proper official. Employees so within seven (7) days from date of notification will be considered out of the service.

(h) Employees furloughed for six (6) months or less will retain their seniority.

(i) A seniority roster of all employees in each classified department, showing name, date of entering the service, and date of promotion, will be posted in a conspicuous accessible place in each roadmaster's or supervisor's office. The names of laborers who have been in the service at least six (6) months prior to date roster is posted or revised will be shown, with their relative standing and the date they entered the service.

(j) The roster will be revised and posted in January of each year, and shall be open to correction for a period of sixty (60) days after date posted on presentation of proof of error by an employee or representative. A copy will be furnished to each foreman or duly accredited representative upon request.

## ARTICLE IX.

### DISCIPLINE AND GRIEVANCES.

(a) An employee disciplined, or who considers himself unjustly treated, shall have a fair and impartial hearing, provided written request is presented to his immediate superior within five (5) days of date of advice of discipline, and the hearing shall be granted within five (5) days thereafter.

(b) A decision will be rendered within seven (7) days after completion of hearing. If an appeal is taken, it must be filed with

the next higher official and a copy furnished the official whose decision is appealed within five (5) days after date of decision. The hearing and decision on the appeal shall be governed by the time limits of the preceding section.

(c) At the hearing, or on the appeal, the employee may be assisted by a committee of employees, or by one or more duly accredited representatives.

(d) The right of appeal by employees or representatives, in regular order of succession and in the manner prescribed, up to and inclusive of the highest official designated by the railroad to whom appeals may be made, is hereby established.

(e) An employee on request will be given a letter stating the cause of discipline. A transcript of the evidence taken at the investigation or on the appeal will be furnished on request to the employee or representative.

(f) If the final decision decrees that charges against employee were not sustained, the record shall be cleared of the charge; if suspended or dismissed the employee shall be returned to former position and paid for all time lost.

(g) Committees of employees shall be granted leave of absence and free transportation for the adjustment of differences between the railroad and the employees.

#### ARTICLE X.

##### GENERAL RULES.

(a) For main line, branch line, and yard section men, the day's work will start and end at point designated to report for duty at their respective sections or yards.

(b) Employees taken from their regular assignment or outfit, to work temporarily elsewhere, will be furnished with board and lodging at the railroad's expense.

(c) Unless they so desire, except in emergency, employees shall not be transferred from one division to another.

#### ARTICLE XI.

##### RULES FOR APPLICATION OF THIS ORDER.

(a) It is not the intention of this order to change the number of days per month for monthly paid employees. The increases per month provided for herein shall apply to the same number of days per month which were worked as of January 1, 1918.

(b) The pay of female employees, for the same class of work, shall be the same as that of men, and their working conditions must be healthful and fitted to their needs. The laws enacted for the government of their employment must be observed.

#### ARTICLE XII.

##### INTERPRETATION OF THIS ORDER.

The rates of pay and rules herein established shall be incorporated into existing agreements and into agreements which may be reached

in the future, on the several railroads; and should differences arise between the management and the employees of any of the railroads as to such incorporation, intent, or application of this order prior to the creation of additional railway boards of adjustment, such questions of difference shall be referred to the Director of the Division of Labor for decision, when properly presented, subject always to review by the Director General.

Agreements or practices, except as changed by this order, remain in effect.

W. G. McAdoo,  
Director General of Railroads.

GENERAL ORDER NO. 32.

UNITED STATES RAILROAD ADMINISTRATION.

Office of the Director General.

Washington, June 29, 1918.

Effective with the settlement of interline passenger accounts for the month of June, 1918, and thereafter, during the period of Federal control, the following rules and regulations shall govern the apportionment of revenues from the sale of tickets, collection of excess baggage revenues, and other analogous revenues, derived from interline passenger service, by one road under Federal control to other roads under such control:

- (1) Interline passenger revenue shall be apportioned to interested carriers under Federal control by the initial carrier on bases of mileage applying via route over which the service is performed.
- (2) Each selling carrier shall determine monthly:
  - (a) The total passengers carried one mile separately for each carrier over whose line tickets are sold.
  - (b) The total revenue applicable to the total passengers carried one mile, as determined by (a).
  - (c) The average revenue per passenger per mile by dividing the total revenue (b) by the total passengers carried one mile (a); such average to be extended to four points beyond the decimal.
  - (d) The revenue accruing to each carrier by multiplying the passengers carried one mile for each carrier (a) by the average revenue per passenger per mile (c).
- (3) The revenues derived from the various classes of traffic, such as mileage and scrip exchange passage tickets, excess train fare tickets or coupons, etc., which are based upon rates other than three (3) cents per mile, shall be eliminated from the regular sales and apportioned separately on the passengers-carried-one-mile basis. This should also be done in the case of special excursion, military or other traffic interchanged between two or more carriers where, if included, it would serve to distort the average revenue per passenger per mile that would obtain for

- other carriers interested in the distribution of the entire sales.
- (4) Excess baggage revenue shall be divided on the same general basis.
  - (5) A carrier which, on and after June 10, 1918, may have a standard rate of fare in excess of three cents (3c) per mile, shall be allowed, in the apportionment of revenue on interline tickets, a constructive mileage; such constructive mileage shall be based on the ratio that the excess rate bears to the standard rate of three cents (3c) per mile. Carriers should not claim constructive mileage when fares to be divided are not made a combination of the local fares based on the higher rate per mile. Revenue derived from such traffic should be apportioned as provided in paragraph 3.
  - (6) The selling carrier shall be held responsible for the correctness of rates and the collection of the proper revenues derived therefrom.
  - (7) The initial or reporting carrier shall be held responsible for the prompt and proper reporting and distribution of interline revenues collected by it in the manner herein prescribed. Claims should be made for unreported tickets. Claims for substantial errors in apportionment, due to the use of erroneous mileage or erroneous average revenue per passenger per mile, shall, if correct, be accepted and adjusted in reports for the subsequent month. Claims for arithmetical errors, such as errors in calculation, addition, etc., which affect a single carrier's proportion to the extent of \$5.00 in any one item, shall likewise be made, and if correct, adjusted; no adjustments shall be made for such errors under \$5.00.
  - (8) Land grant revenues and revenues affected by land grant equalizations, shall, until otherwise ordered, be reported and apportioned separately on bases heretofore applicable.
  - (9) Arbitraries on account of water transfers, bridge tolls, omnibus and baggage transfers and other similar arbitraries heretofore considered in the division of interline fares, shall be allowed to the carrier to which such arbitraries accrue. Proportions accruing to carriers not under Federal control, including boat and stage lines, etc., shall also be determined and allowed on regular bases heretofore in effect, and reported direct to such lines; such arbitraries and proportions shall be deducted from the gross revenue and the remainder shall be used in establishing the average revenue per passenger per mile for apportionment of revenues to carriers under Federal control.
  - (10) Interline passenger revenues shall be reported to interested carriers in such manner and on such forms as may be prescribed by the Director of Public Service and Accounting, in instructions to be issued by him, which instructions shall be complied with. For the present, the standard Association form of blanks may be used.



- (11) The methods herein prescribed for apportioning interline passenger revenues should be extended to carriers not under Federal control as far as practicable; therefore, should carriers not under such control desire to avail themselves of the simplified bases for apportioning interline passenger revenues, as herein prescribed, in conjunction with carriers under such control, arrangements may be made between such interested carriers for the extension of such methods.

W. G. McAdoo,  
Director General of Railroads.

GENERAL ORDER NO. 33.  
UNITED STATES RAILROAD ADMINISTRATION.  
Office of the Director General.

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Washington, July 10, 1918.

Mr. G. A. Tomlinson, General Manager of the New York Canal Section of the United States Railroad Administration, is appointed Federal Manager of New York and New Jersey Canals, effective July 15, 1918, and as such will perform the functions heretofore performed by him as General Manager of New York Canal Section of the United States Railroad Administration, and in addition will operate for the Director General upon the Delaware & Raritan Canal and connecting waters such equipment as the United States Railroad Administration now has in its possession and control engaged in such operation and such additional equipment as may be assigned for that purpose. He is authorized to enforce and collect such toll charges as are or may hereafter be established for the use of the Delaware & Raritan Canal by Boats operated by others and empowered to enter into contracts, either in his own name as such Federal Manager or in the name of the Director General of Railroads, for the purchase of supplies needed in such operation and for the transportation of property upon such Canal and other waters.

W. G. McAdoo,  
Director General of Railroads.

GENERAL ORDER NO. 34.  
UNITED STATES RAILROAD ADMINISTRATION.  
Office of the Director General.

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Washington, July 10, 1918.

Carriers subject to Federal control shall sell at public auction to the highest bidder, without advertisement, carload and less than carload nonperishable freight that has been refused or is unclaimed by consignee and has been on hand for a period of sixty days. The consignee, as described in the waybilling, shall be given due notice by mail of the proposed sale.

Perishable freight shall be sold whenever in the judgment of the agent or other representative of the carrier it is necessary to do so,

such reasonable effort being made to notify the consignee as described in the waybilling as the circumstances will permit.

The place of sale of both nonperishable and perishable freight shall be determined by the carrier. The net proceeds, if any, after deducting freight and other legitimate expenses, will be paid over to the owner on proof of ownership.

W. G. McAdoo.

Director General of Railroads.

GENERAL ORDER NO. 35.

UNITED STATES RAILROAD ADMINISTRATION.

Office of the Director General.

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Washington, July 11, 1918.

Effective this date, Mr. M. J. Sanders is hereby appointed Federal Manager of Mississippi and Warrior Waterways for the United States Railroad Administration, with headquarters at New Orleans, Louisiana, and, as such, will have charge of the construction and acquisition of equipment for use upon the Mississippi River between St. Louis and New Orleans, and for use upon the Warrior River between the Alabama coal fields and Mobile, and in connection therewith for use upon the Mississippi Sound and connecting waters between Mobile and New Orleans, and will operate such equipment for the Director General of Railroads upon all such waters.

He is hereby empowered to enter into contracts, either in his own name as such Federal Manager or in the name of the Director General of Railroads, for the construction, acquisition or chartering of such equipment, for the purchase of supplies needed in such operations, and for the transportation of traffic upon all such waters.

W. G. McAdoo.

Director General of Railroads.

GENERAL ORDER NO. 36.

UNITED STATES RAILROAD ADMINISTRATION.

Office of the Director General.

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Washington, July 18, 1918.

Premiums on fidelity bonds, which have heretofore been paid by or charged to officers, agents, and employees on transportation lines now, or which may hereafter be placed, under Federal control, shall no longer be so handled but shall be charged to operating expenses.

W. G. McAdoo.

Director General of Railroads.

GENERAL ORDER NO. 37.

UNITED STATES RAILROAD ADMINISTRATION.

Office of the Director General

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Washington, July 19, 1918.

(1) The Local Treasurers appointed by Federal Managers or by General Managers appointed in lieu of Federal Managers, shall here-

after be designated "Federal Treasurers" and are expected to devote themselves exclusively to the work of the United States Railroad Administration. They ought not to handle any funds for a railroad corporation or perform any other services therefor except in special cases after obtaining express authority. The Federal Treasurers should be nominated by the Federal Manager (or General Manager appointed in lieu of Federal Manager), and the nomination, when it shall have been approved by the Regional Director, should be transmitted to the Director of the Division of Finance for consideration and final action. In cases where Federal Treasurers have already been appointed the appointments should be submitted promptly through the Regional Director with his recommendations for confirmation by the Director of the Division of Finance.

(2) Immediately upon the appointment of Federal Treasurers the designation of the bank account subject to check of such Federal Treasurers shall be "(Name of Railroad), Federal Account."

(3)

(a) All cash representing receipts from the operations of its railroad since and including January 1, 1918, now in the hands of the railroad corporation for whose railroad a Federal Treasurer has been appointed, or held for account of the corporation, and

(b) Any and all other cash now in the hands of such railroad corporation or held for its account for use in connection with the operation or improvement of its railroad

shall be at once transferred by the railroad corporation to accounts in the same banks in which it is now held, designated as prescribed in paragraph (2) hereof, which shall be subject to check by the Federal Treasurer.

(4) Federal Treasurers shall draw on the new accounts thus to be opened and subject to their check only for

(a) the payment of materials and supplies purchased since December 31, 1917.

(b) the payment of operating expenses and taxes (other than the war income tax and the excess profits tax) accrued since December 31, 1917, and

(c) The payment of such addition and betterment costs as may be approved by the Federal Manager (or General Manager appointed in lieu of the Federal Manager).

Federal Treasurers shall not draw on such accounts for any other purposes except when expressly authorized to do so by the Director of the Division of Finance and Purchases.

(5) A specimen form of check which has been approved for use by all railroads under Government control is attached hereto. In ordering checks for the use of the railroad the Federal Treasurer will follow as closely as practicable the general arrangement and language of the specimen form. The account with every bank must be stated

in the name of the railroad with the name "Federal Account" immediately following *on the same line* as shown in the attached specimen.

(6) Until further ordered checks signed by the Treasurer should be countersigned according to the practice now in vogue on the different roads where regulations now call for such countersignatures.

Director General of Railroads.

W. G. McAdoo.

GENERAL ORDER NO. 37-A.

UNITED STATES RAILROAD ADMINISTRATION.

Office of the Director General of Railroads.

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Washington, August 1, 1918.

General Order No. 37 of July 19, 1918, is hereby revised to read as follows—(the words underscored indicating the additions to the Order as originally issued).

(1) The Local Treasurers appointed by Federal Managers, or by General Managers appointed in lieu of Federal Managers, shall hereafter be designated "Federal Treasurers" and are expected to devote themselves exclusively to the work of the United States Railroad Administration. They ought not to handle any funds for a railroad corporation or perform any other services therefor except in special cases after obtaining express authority.

The Federal Treasurers should be nominated by the Federal Manager, (or General Manager appointed in lieu of Federal Manager), and the nomination, when it shall have been approved by the Regional Director, should be transmitted to the Director of the Division of Finance for consideration and final action. In cases where Federal Treasurers have already been appointed the appointments should be submitted promptly through the Regional Director with his recommendations for confirmation by the Director of the Division of Finance.

(2) Immediately upon the appointment of Federal Treasurers the designation of the bank account subject to check of such Federal Treasurers shall be "(Name of Railroad), Federal Account."

(3)

(a) All cash representing receipts from the operations of its railroad since and including January 1, 1918, now in the hands of the railroad corporation for whose railroad a Federal Treasurer has been appointed, or held for account of the corporation, and

(b) Any and all other cash now in the hands of such railroad corporation or held for its account for use in connection with the operation or improvement of its railroad shall be at once transferred by the railroad corporation to accounts in the same banks in which it is now held, designated as prescribed in paragraph (2) hereof, which shall be subject to check by the Federal Treasurer.

(4) Federal Treasurers shall draw on the new accounts thus to be opened and subject to their check only for

- (a) The payment of materials and supplies purchased since December 31, 1917; and also of materials and supplies purchased prior to December 31, 1917;
- (b) the payment of operating expenses (including approved claims for personal injuries and loss and damage), and also equipment and joint facility rents, traffic balances, overcharges and taxes (other than the war income tax and the excess profits tax) accrued since December 31, 1917; and also all items clearly applicable to the period prior to January 1, 1918, commonly called "lap-overs," which are required to be set up on the Federal books pursuant to Order No. 17.
- (c) the payment of such addition and betterment costs as may be approved by the Federal Manager (or General Manager appointed in lieu of the Federal Manager).

Federal Treasurers shall not draw on such accounts for any other purpose except when expressly authorized to do so by the Director of the Division of Finance and Purchases.

(5) A specimen form of check which has been approved for use by all railroads under Government control is attached hereto. In ordering checks for the use of the railroad the Federal Treasurer will follow as closely as practicable the general arrangement and language of the specimen form. The account with every bank must be stated in the name of the railroad with the name "Federal Account" immediately following on the same line as shown in the attached specimen.

(6) Until further ordered checks signed by the Treasurer should be countersigned according to the practice now in vogue on the different roads where regulations now call for such countersignatures.

W. G. McADOO.

Director General of Railroads.

#### GENERAL ORDER NO. 38.

UNITED STATES RAILROAD ADMINISTRATION.

Office of the Director General

Washington, D. C., July 24, 1918.

Pursuant to the Act approved March 21, 1918, entitled "An Act to provide for the operation of transportation systems while under Federal Control, for the just compensation of their owners, and for other purposes," it is ordered that on and after the 15th day of August, 1918, the following requirements and provisions shall apply and be observed in respect to the shipments hereinafter described:

1. Shipments intended for use of any one of the Government Departments, either directly or through a contractor with the United States Government, shall not be entitled to or receive any privilege which may be accorded on account of being in-

tended for use of one of the United States Government Departments, either directly or indirectly through a contractor with the United States Government, where said shipments are consigned otherwise than in one of the following ways:

- (a) To a Government officer designated, not by the name of the individual, but by the title of his position as for example: Supply Officer, Naval Inspector, or Constructing Quartermaster.
- (b) To a Government officer designated not by name but by title as above, followed by the words "For account of," and then followed by the name of the contractor or agent for the Government engaged on the work at the point of destination.
- (c) On some contracts the Government has entered into an agreement designating certain parties as agent, or agents, for the Government on that particular contract. Shipments for such parties shall be consigned to the particular Department for which the work is being done, followed by the words "For account of," and then followed by the name of the agent as, for instance:

Ordnance Department: For account of duPont Engineering Co. Agent, Penniman, Williamsburg, Va.

or

Ordnance Department: For account of T. A. Gillespie, Loading Co., Agents. South Amboy, N. J.

- (d) Shipments of material, equipment and supplies for any person repairing or building ships under the supervision of the United States Shipping Board Emergency Fleet Corporation, shall be consigned only to the United States Shipping Board Emergency Fleet Corporation, followed by the words "For account of" and then followed by the name and location of the particular concern performing the work, as for instance:

United States Shipping Board Emergency Fleet Corporation: For account of American International Shipbuilding Corporation, Hog Island, Pa.

2. It is forbidden—

- (a) In consigning a shipment to use the words, "United States Government" or substantially that term, or abbreviations thereof, as the sole description of the consignee:
- (b) Or to consign a shipment to and in the name of the United States Government followed by words indicating that it is sent "care of" a private person, firm or corporation:
- (c) Or to consign a shipment to a Government official or to an officer of the Army or Navy by his name as an individual.

- (d) Or to consign a shipment to a Government official or to an officer of the Army or Navy followed by words indicating that it is sent "care of" a private person, firm or corporation.
3. No shipper or other person seeking or obtaining any privilege which may be accorded on account of the shipment being intended for the use of any one of the United States Government Departments, either directly or indirectly through a contractor with the United States Government, shall without authority, use or cause to be used as consignee the name or title of the United States or of any department, bureau, agency, employee or officer thereof, or of the United States Shipping Board Emergency Fleet Corporation or of any officer, agent, employee thereof, or of any other person, or the designation "Emergency Fleet Corporation;" nor shall any shipper or other person offer or cause to be received for carriage, or transported, without authority, any such shipment consigned as specified in the foregoing paragraphs number 1 and 2, for the purpose of securing, by such consignment, any privilege which may be accorded on account of the shipment being intended for the use of any one of the United States Government Departments, either directly or indirectly through a contractor with the United States Government.
4. Agents are forbidden to sign or issue bills of lading or receipts for shipments which in any manner conflict with any of the foregoing provisions.

W. G. McAdoo.  
Director General of Railroads.

GENERAL ORDER NO. 39.  
UNITED STATES RAILROAD ADMINISTRATION.  
Office of the Director General

Washington, August 12, 1918.

The sale of liquors and intoxicants of every character in dining cars, restaurants and railroad stations under Federal control shall be discontinued immediately.

W. G. McAdoo.  
Director General of Railroads.

GENERAL ORDER NO. 40.  
UNITED STATES RAILROAD ADMINISTRATION.  
Office of the Director General of Railroads.

Washington, D. C., August 18, 1918.

*To all employees in the railroad service of the United States:*

Complaints have reached me from time to time that employees are not treating the public with as much consideration and courtesy under

Government control of the railroads as under private control. I do not know how much courtesy was accorded the public under private control, and I have no basis, therefore, for accurate comparison. I hope, however, that the reports of discourtesy under Government administration of the railroads are incorrect, or that they are at least confined to a relatively few cases. Whatever may be the merits of these complaints, they draw attention to a question which is of the utmost importance in the management of the railroads.

For many years it was popularly believed that "the public be damned" policy was the policy of the railroads under private control. Such a policy is indefensible either under private control or Government control. It would be particularly indefensible under public control when railroad employees are the direct servants of the public. "The public be damned" policy will in no circumstances be tolerated on the railroads under Government control. Every employee of the railroad should take pride in serving the public courteously and efficiently. Courtesy costs nothing and when it is dispensed, it makes friends of the public and adds to the self-respect of the employee.

My attention has also been called to the fact that employees have sometimes offered as an excuse for their own shortcomings, or as a justification for delayed trains or other difficulties the statement that "Uncle Sam is running the railroads now" or "These are McAdoo's orders," etc. Nothing could be more reprehensible than statements of this character, and nothing could be more hurtful to the success of the Railroad Administration or to the welfare of railroad employees themselves. No doubt, those who have made them have done so thoughtlessly in most instances, but the harm is just as great if a thing of this sort is done thoughtlessly as if it is done deliberately.

There are many people who for partisan or selfish purposes wish Government operation of the railroads to be a failure. Every employee who is discourteous to the public or makes excuses or statements of the kind I have described, is helping there partisan or selfish interests to discredit Government control of railroads.

Recently the wages of railroad employees were largely increased, involving an addition to railroad operating expenses of more than \$475,000,000 per annum. In order to meet this increase, the public has been called upon to pay largely increased passenger and freight rates. The people have accepted the new burden cheerfully and patriotically. The least that every employee can do in return is to serve the public courteously, faithfully and efficiently.

A great responsibility and duty rest upon the railroad employees of the United States. Upon their loyalty, efficiency and patriotism depends in large part America's success and the overthrow of the Kaiser and all that he represents. Let us not fail to measure up to our duty, and to the just demand of the public that railroad service shall not only be efficient, but that it shall always be courteously administered.

W. G. McAdoo.  
Director General of Railroads.



## GENERAL ORDER NO. 41.

UNITED STATES RAILROAD ADMINISTRATION.  
Office of the Director General of Railroads.

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Washington, August 28, 1918.

Regulations Governing Disposition of Inter-Road Freight Claims for  
Loss and Damage.

The following regulations will govern carriers under Federal control in investigating, paying and accounting for freight claims for loss and damage arising during Federal control. They will not affect the distribution of settlements involving any road not under Federal control, nor the distribution of claims clearly applicable to the period prior to Federal control.

1. *Presentation of claims:* Effective September 1st, 1918, claims for loss of or damage to freight shall, except as modified in this paragraph, be presented to and settled by the destination or initial carrier. Claims filed with an intermediate carrier, through error, shall be immediately transmitted to the destination carrier and claimant so advised. An intermediate carrier clearly at fault may invite and adjust claims direct. Claims for fire or marine losses shall be referred for adjustment to the carrier responsible, and claimant so advised.
2. *Papers necessary to support claims:* Claims for loss of or damage to freight shall be made on the standard forms approved by the Interstate Commerce Commission. In the case of loss or damage, they shall be supported by original bill of lading, if not previously surrendered to carrier, original paid freight receipt, if issued, original or certified copy of invoice of value and all obtainable facts in proof of such loss or damage and the value thereof. If any necessary document is lost or destroyed, claimant shall file a bond of indemnity to cover.
3. *Method of adjustment:* The foregoing provisions having been complied with, loss and damage claims shall be adjusted with the claimant in accordance with the established legal liability, bill of lading, tariff provisions and Federal regulations, by the carrier to which presented for the account of and without reference to the other carriers, interested in the haul, before the completion of other investigations necessary for the purpose of locating responsibility or apportioning the amount paid.
4. *Car seal records:* Investigation for development of car seal records in connection with the appointment of claims between carriers shall be discontinued.
5. *Loss or damage definitely located:* Claims for loss or damage definitely located, the legal liability for which has been established and payment made, shall be charged direct to carrier or carriers responsible therefor.

6. *Loss or Damage Unlocated:* Claims for unlocated loss or damage, the legal liability for which has been established and payment made, shall be apportioned to interested carriers on mileage basis, with minimum of ten miles for any carrier.
7. *Claims Involving Litigation:* Law expenses, including court costs, incurred in connection with the defense of an action where recovery is had, shall be apportioned among the carriers involved on the same basis as the claim. In the event there is no recovery, the law expenses shall be apportioned between the carriers interested on a mileage basis, minimum ten miles for any carrier, and subject to Paragraph 8, Minimum Debits.
8. *Minimum Debits:* Except as provided in Paragraph 5 hereof, the entire amount of any individual loss and damage claim shall be absorbed by the settling carrier, unless the amount chargeable against all other carriers under Federal control in interest exceeds five dollars (\$5.00). Proportions less than one dollar (\$1.00) against any one carrier shall, however, be absorbed by the settling carrier.
9. *Settlement Between Carriers:* On or before the tenth day of each month, paying carrier shall render a statement of amount due from each debtor carrier showing thereon the claim number, points between which shipment moved over debtor line, waybill reference and date, commodity, nature of claim and amount. The total amount of such statement shall be accepted by debtor carrier as final, except if it be found that an amount was included in statement in error, or a manifest clerical error, adjustment shall be made therefor in the subsequent statement, as prescribed in General Order No. 30. Manifest errors in claim payments should be brought to the attention of the debiting carrier.
10. *Monthly Statements:* Separate monthly statements shall be rendered for liabilities, which were incurred prior to January 1st, 1918, and for liabilities, which were incurred subsequent to December 31st, 1917. In no case shall a single statement include both prior and subsequent liabilities. Such statements rendered against debit carriers should be forwarded through the proper accounting officer of the carrier by whom they are prepared.
11. *Method of Payment:* Loss and damage freight claims shall be audited and paid on regularly audited vouchers in same manner as other operating expenses are vouched. Such vouchers shall be approved for audit by the Freight Claim Agent, and for payment by or under the direction of the officer designated to approve vouchers for payment. Provided, however, loss and damage freight claims may be paid by drafts drawn upon the Federal or Local Federal Treasurer having jurisdiction within the same limitations which are now in effect and authorized by the officer in charge of such authorization.

12. *Custody of Claim Papers*: Claim papers shall remain in possession of paying carrier, except that where individual claims are charged in full to another carrier, the papers may be sent to such carrier upon request. When documents supporting either paid or unpaid claims leave possession of carrier, they shall be plainly stamped with carrier's name and claim number.
13. *Notations of Exceptions on Waybills*: Loss or damage discovered at any point in transit shall be specifically noted on face of waybill, dated and signed in name of Agent, Conductor or other authorized employee, giving name of carrier responsible, or point where discovered if responsibility is located.
14. *Noting Exceptions on Paid Freight Receipts*: Agents delivering freight to consignee, when shortage or damage is known to exist, shall make specific notation of extent and nature of the loss or damage on face of original paid freight bill and sign and date such notation in ink. When freight bears external evidence of pilferage or damage at time of delivery, a joint inspection with consignee or his representative shall, when practicable, be made at the delivery station and receipt taken in accordance therewith. Claim for value of freight checking short at destination shall not be paid until inquiry has been made of delivering agent and consignee to ascertain if shortage has since arrived or reached consignee through any source.
15. *Delivery of Astray Freight*: Astray freight (freight marked with name and address of consignee, but separated from regular revenue waybill) shall be immediately forwarded to marked destination on standard form of waybill, without charges (copy by mail to destination agent) and such waybill shall bear the notation "Astray Freight—Deliver only on presentation of original bill of lading or original paid freight receipt or other proof of ownership." Destination agent receiving astray freight shall immediately notify consignee to whom marked, and if regular revenue waybill is not received, delivery shall be made on presentation of proof of ownership prescribed and collected of tariff charges from point where shipment originated. Special efforts should be made to establish the ownership of perishable freight, in order to insure prompt delivery.
16. *Freight Claim Association Rules*: Rules prescribed by the Freight Claim Association, except such as conflict with the regulations herein provided, shall govern all carriers under Federal control until otherwise ordered.

W. G. McADOO.  
Director General of Railroads.

GENERAL ORDER NO. 42.  
UNITED STATES RAILROAD ADMINISTRATION.  
Office of the Director General of Railroads.

Washington, August 31, 1918.

*To all offices and employees in the railroad service of the United States:*

The approaching Federal and State elections, including the primary contests connected therewith, make it both timely and necessary that the attitude of the Director General toward political activity on the part of officers and employees in the railroad service should be clearly stated.

It was a matter of common report that railroads under private control were frequently used for partisan political purposes; that railroad corporations were frequently adjuncts of political machines, and that even sovereign States had been at times dominated by them. Contributions to campaign funds and the skillful and effective coercion of employees were some of the means by which it was believed that many railroads exerted their power and influence in politics. Scandals resulted from such practices, the public interest was prejudiced, and hostility to railroad managements were engendered.

Now, that the Government controls and operates the railroads, there is no selfish or private interest to serve, and the incentive to political activity on the part of the railroads no longer exists.

Under Government control there is no inducement to officers and employees to engage in politics. On the contrary, they owe a high duty to the public scrupulously to abstain therefrom.

It is therefore announced as a definite policy of the United States Railroad Administration that no officer, attorney, or employee shall—

1. Hold a position as a member or officer of any political committee or organization that solicits funds for political purposes.
2. Be a delegate to or chairman or officer of any political convention.
3. Solicit or receive funds for any political purpose or contribute to any political fund collected by an official or employee of any railroad or any official or employee of the United States or of any state.
4. Assume the conduct of any political campaign.
5. Attempt to coerce or intimidate another officer or employee in the exercise of his right of suffrage. Violation of this will result in immediate dismissal from the service.
6. Become a candidate for any political office. Membership on a local school or park board will not be construed as a political office. Those desiring to run for political office or to manage a political campaign must immediately sever their connection with the United States Railroad Service.

I am sure that I can count on the loyal cooperation of all officers, attorneys, and employees engaged in the operation of the railroads under Federal control to carry out in letter and spirit the policy here

announced. This policy is intended to secure to all of them freedom of action in the exercise of their individual political rights, and, at the same time, to prevent any form of hurtful or pernicious political activity.

Let us demonstrate to the American people that, under Federal control, railroad officers, attorneys, and employees can not be made a part of any political machine nor be used for any organized partisan or selfish purpose.

Let us set such a high standard of public duty and service that it will be worthy of general emulation.

W. G. McADOO.

Director General of Railroads.

GENERAL ORDER NO. 43.

UNITED STATES RAILROAD ADMINISTRATION.

W. G. McADOO, Director General of Railroads.

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Washington, September 5, 1918.

WHEREAS proceedings in garnishment, attachment, or like process by which it is sought to subject or attach money or property under Federal control or derived from the operation of carriers under Federal control under the act of Congress of March 21, 1918, are inconsistent with said act, and with the economical and efficient administration of Federal control thereunder; and

WHEREAS such proceedings are frequently commenced, particularly for the garnishment or attachment of amounts payable, or claimed to be payable, as wages or salaries of employees, which practice is prejudicial to the interests of the Railroad Administration in the operation of the lines and systems of transportation under Federal control, and is not necessary for the protection of the rights or the just interests of employees or others; and

WHEREAS if any rules or regulations become necessary to require employees to provide for their just debts, the same will be issued hereafter;

IT IS THEREFORE ORDERED that no moneys or other property under Federal control or derived from the operations of carriers while under Federal control shall be subject to garnishment, attachment, or like process in the hands of such carriers or any of them, or in the hands of any employee or officer of the United States Railroad Administration.

W. G. McADOO.

Director General of Railroads.



# TABLE OF CASES

[REFERENCES ARE TO PAGES]

## A.

- |  |          |  |  |      |                  |
|--|----------|--|--|------|------------------|
| Abell v. Atchison, T. & S. F. Ry. Co., 100 Kan.                        | 238      | 559  | Alabama, etc., R. Co. v. McClesky, 160 Ala.                  | 630  | 743              |
| Absheir v. Louisiana Ry. & Nav. Co., 141 La.                           | 194      | 959  | v. Skotzy, 196 Ala.  | 25   |                  |
| Adair v. United States, 208 U. S.                                      | 161      | 14, 46, 50, 51, 690, 1265  | 733, 842, 860, 861, 867,                                     |      |                  |
| Adams v. New York, 192 U. S.   | 585      | 679  | 873, 1017  |      |                  |
| Adams Exp. Co. v. Com., 238 U. S.                                      | 190      | 16, 33   | v. Smith, 81 Ala.  | 229  | 1211             |
| v. Com., 214 U. S.   | 218      | 17, 21   | v. Tidwell, 145 Ga.  | 190  |                  |
| v. Com., 206 U. S.   | 129      | 21   | 703, 916, 946  |      |                  |
| v. Com., 160 Ky.   | 66       | 33   | Alabama & V. R. Co. v. Mississippi R. Commission, 203 U. S.  | 496  | 72, 416          |
| v. Com., 154 Ky.   | 462      | 33   | Aldread v. Northern Pac. R. Co., 93 Wash.                    | 209  |                  |
| v. Cook, 162 Ky.   | 592      | 59, 81, 171  | 776, 861, 874, 881, 922                                      |      |                  |
| v. Crigler & Crigler Co., 161 Ky.                                      | 89       | 33   | Aldrich v. Atlantic Coast Line R. Co., 104 S. C.             | 364  |                  |
| v. Croninger, 226 U. S.  | 491      | 39, 56, 59, 81, 170, 249, 257, 443, 531, 544, 558, 567, 572, 576, 581, 594, 608, 986 | 173, 563, 570  |      |                  |
| v. State, 161 Ind.   | 328      | 370  | Alexander v. Great Northern R. Co., 51 Mont.                 | 565  |                  |
| v. Welborn, 59 Ind. App.   | 330      | 171  | 703, 718, 773, 833   |      |                  |
| Adams Seed Co. v. Chicago Great Western R. Co., — Iowa —, 165 N. W.    | 367      | 592  | v. Parker, 144 Ill.  | 355  | 1107             |
| Addyston Pipe & Steel Co. v. United States, 175 U. S.                  | 211      | 9, 13, 14, 743, 1134   | v. Pennsylvania Co., 48 Ohio St.                             | 623  | 929, 1267        |
| Adger v. Blue Ridge Ry. Co., 71 S. C.                                  | 213      | 291  | Allen v. Gerard, 21 R. I.                                    | 467  | 785              |
| Aetna Life Ins. Co. v. Ward, 140 U. S.                                 | 76       | 518  | v. Pittsburgh & C. R. Co., 45 Md.                            | 41   | 1267             |
| Ahrens v. Chicago, M. & St. P. R. Co., 121 Minn.                       | 335      | 1009, 1195, 1405   | v. Pullman's Palace Car Co., 191 U. S.                       | 171  | 16               |
| Alabama Great Southern R. Co. v. American Cotton Oil Co., 143 C. C. A. | 313, 229 | 550  | v. Tuscarora Val. R. Co., 229 Pa.                            | 97   | 1211, 1213, 1420 |
| Fed. 11  |          |  | Allen & Lewis v. Oregon R. & Nav. Co., 98 Fed.               | 16   | 177              |
| v. Bonner, — Ala. —, 75 So.  | 986      | 902  | Almand v. Georgia Railroad & Banking Co., 95 Ga.             | 775  | 593              |
| v. Chapman, 83 Ala.  | 453      | 1215   | Almy v. California, 24 How. (U. S.)                          | 169  | 19, 51           |
| v. George H. McFadden & Bros., 232 Fed.                                | 1000     | 278, 451, 467, 770   | Alvarado v. Southern Pac. Co., — Tex. Civ. App. —, 193 S. W. | 1108 | 1141             |
|  |          |  | American Exp. Co. v. Beer, 107 Miss.                         | 528  | 33               |
|  |          |  | v. Burke & McGuire, 104 Miss.                                | 275  | 172              |
|  |          |  | v. Iowa, 196 U. S.   | 133  | 17, 21, 32       |
|  |          |  | v. State ex rel. Caldwell, 244 U. S.                         | 617  | 54, 378          |
|  |          |  | v. United States, 212 U. S.                                  | 522  | 182, 257, 456    |
|  |          |  | v. United States Horse Shoe Co., 244 U. S.                   | 58   | 558              |

[REFERENCES ARE TO PAGES]

- American Lead Pencil Co. v. Nashville, C. & St. L. Ry. Co., 124 Tenn. 57 575
- American Lithographic Co. v. Werekmeister, 221 U. S. 603 680
- American Pub. Co. v. Fisher, 166 U. S. 464 1237
- American R. Co. of Porto Rico v. Birch, 224 U. S. 547 724, 758, 1063, 1074, 1091, 1171, 1173, 1209
- v. Coronas, 144 C. C. A. 599, 230 Fed. 545 1138, 1143, 1173
- v. Didricksen, 227 U. S. 145 758, 1064, 1074, 1089, 1098, 1105, 1171, 1212, 1270, 1281
- American Silver Mfg. Co. v. Wabash R. Co., 174 Mo. App. 184 543, 580
- American Sugar Refining Co. v. Delaware, L. & W. R. Co., 125 C. C. A. 251, 207 Fed. 733 314
- American Union Coal Co. v. Pennsylvania R. Co., 159 Fed. 278 463
- Ames v. Kirby, 71 N. J. L. 442 246
- v. Lake Shore & M. S. Ry. Co., 135 Ind. 363 1018
- v. New York Cent. R. Co., — N. Y. App. Div. —, 165 N. Y. Supp. 84 785, 792
- Ammons v. Southern R. Co., 138 N. C. 555 420
- Anderson v. Louisville & N. R. Co., 127 C. C. A. 277, 210 Fed. 689 1171, 1176
- v. Oregon Short Line R. Co., 47 Utah 614 1132, 1136
- v. Pacific Coast S. S. Co., 225 U. S. 187 47
- v. Texas & P. R. Co., 139 La. 1104 916
- Andrew v. Roberts, — Tex. Civ. App. —, 192 S. W. 569 544
- Andrews v. Hartford & N. H. R. Co., 34 Conn. 57 1142
- Anest v. Columbia & P. S. R. Co., 89 Wash. 609 745, 823, 1040, 1127, 1244
- Appel Suit & Cloak Co. v. Platt, 55 Colo. 45 171
- Aradalou v. New York, N. H. & H. R. Co., 225 Mass. 235 172, 529, 543
- Arizona Eastern R. Co. v. Bryan, 18 Ariz. 106 1030, 1042
- Armbrecht v. Delaware, L. & W. R. Co., — N. J. L. —, 101 Atl. 203 795, 822, 917, 989
- Armbruster v. Chicago, R. I. & P. R. Co., 166 Iowa 155 731, 734, 860, 895, 900, 1204, 1233
- Armitage v. Chicago, M. & St. P. Ry. Co., — Mont. —, 166 Pac. 301 922, 1369
- Armour Packing Co. v. United States, 209 U. S. 56 155, 165, 436, 438, 450, 466, 467, 1133
- Armour & Co. v. Harcrow, 133 C. C. A. 218, 217 Fed. 224 944, 945
- v. State, 240 U. S. 510 56
- Armstrong v. Illinois Cent. R. Co., 162 Ky. 539 81, 171, 569
- Asbell v. State, 209 U. S. 251 25, 23, 47, 742
- Asher v. Texas, 128 U. S. 129 11
- Atchison, T. & S. F. Ry. Co. v. Ayers, — Tex. Civ. App. —, 192 S. W. 310 862, 867, 981
- v. Bell, 31 Okla. 238 458, 468, 474
- v. Bowman, 61 Colo. 477 451
- v. Calhoun, 213 U. S. 1 944, 945
- v. Denver & N. O. R. Co., 110 U. S. 667 177, 305, 369, 538
- v. De Sedillo, 135 C. C. A. 358, 219 Fed. 686 942
- v. Ehret, — Okla. —, 152 Pac. 1107 458, 468
- v. Fajardo, 74 Kan. 314 1055
- v. Harold, 241 U. S. 371 56, 170, 271, 597, 770
- v. Hines, 127 C. C. A. 632, 211 Fed. 264 1075
- v. Holmes, 18 Okla. 92 458, 468
- v. Kinkade, 203 Fed. 165 456
- v. Miller, — Colo. —, 163 Pac. 836 559
- v. Mills, 49 Tex. Civ. App. 349 693, 758
- v. Moore, 233 U. S. 182 455, 542
- v. Pickens (Tex. Civ. App.), 118 S. W. 1133 758
- v. Pitts, 44 Okla. 604 718, 773, 799, 858
- v. Robinson, 233 U. S. 173 80, 170, 249, 436, 444, 456, 458, 542, 558, 567
- v. Rodgers, 16 N. M. 120 172
- v. Schroeder, 56 Kan. 731 1211



[REFERENCES ARE TO PAGES]

- Atchison, etc., Ry. Co. v. Smyth,  
— Tex. Civ. App. —, 189 S.  
W. 70 173, 453, 541  
v. Superior Refining Co., 83  
Kan. 732 467  
v. Swearingen, 239 U. S. 339  
922, 942, 944, 1012,  
1048, 1405  
v. Tack, 61 Tex. Civ. App.  
551 724, 758, 1032  
v. United States, 244 U. S.  
336 1442, 1443, 1447,  
1455, 1471, 1481  
v. United States, 232 U. S.  
199 180, 288, 292, 293,  
363, 450, 463, 654  
v. United States, 155 C. C.  
A. 644, 243 Fed. 114  
1435, 1462, 1471, 1481, 1486  
v. United States, 150 C. C.  
A. 168, 236 Fed. 906  
1462, 1470  
v. United States, 136 C. C.  
A. 354, 220 Fed. 748  
1455, 1471, 1477  
v. United States, 117 C. C.  
A. 341, 198 Fed. 637  
1300, 1330  
v. United States, 100 C. C.  
A. 534, 177 Fed. 114  
1435, 1488  
v. United States, 96 C. C.  
A. 664, 172 Fed. 1021 1310  
v. United States, 204 Fed.  
647 180  
v. Victoria, F. & W. R. Co.,  
234 U. S. 1 741  
v. Wilson, 1 C. C. A. 25, 48  
Fed. 57 1112  
Atkinson v. Bullard, 14 Ga.  
App. 69 734, 798, 1194, 1228  
v. Southern Exp. Co., 94 S.  
C. 444 33  
Atlanta, K. & N. Ry. Co. v.  
Hooper, 35 C. C. A. 24, 92  
Fed. 820 1211  
v. Smith, 1 Ga. App. 162 1215  
Atlantic City R. Co. v. Parker,  
242 U. S. 56 1154, 1307,  
1309, 1340, 1342, 1343  
Atlantic Coast Line R. Co., Ex  
parte, 190 Ala. 132 703, 705,  
775, 835, 1180, 1193  
Atlantic Coast Line R. Co.  
v. Burnette, 239 U. S. 199  
731, 733, 1138, 1139  
1155, 1210  
v. Georgia, 234 U. S. 280  
742, 1280  
Atlantic Coast Line R. Co. v.  
Jones, 12 Ala. App. 419 722,  
1197  
v. Jones, 9 Ala. App. 499  
763, 842, 902, 909, 1181,  
1193  
v. Kennedy, — Ga. App. —,  
92 S. E. 973 980, 989,  
1009, 1401  
v. Macon Grocery Co., 92 C.  
C. A. 114, 166 Fed. 206  
292, 463, 640  
v. Mazursky, 216 U. S. 122 46  
v. Mims, 242 U. S. 532 776,  
1154, 1165, 1168, 1208  
v. North Carolina Corpora-  
tion Commission, 206  
U. S. 1 14, 43, 69, 70,  
82, 84, 87  
v. Reaves, 125 C. C. A. 599,  
208 Fed. 141 1180, 1182  
v. Riverside Mills, 219 U. S.  
186 46, 50, 81, 168, 527,  
532, 538, 539, 548, 552,  
585, 592, 1133  
v. State, 234 U. S. 280 39,  
45, 58, 98, 1500  
v. State ex rel. Ellis, 203 U.  
S. 256 70  
v. Thomasville Live Stock  
Co., 13 Ga. App. 102  
81, 171, 451, 542  
v. Tomlinson, — Ga. App.  
—, 94 S. E. 909 740  
v. Treadway, — Va. —, 93  
S. E. 560 730  
v. United States, 94 C. C. A.  
35, 168 Fed. 175 923,  
1266, 1284, 1310, 1314,  
1425  
v. Virginia Mfg. Co., 119  
Va. 5 453  
v. Ward, 4 Ala. App. 374  
171, 531, 541  
v. Wharton, 207 U. S. 328  
43, 82, 87  
v. Whitney, 65 Fla. 72 922,  
1310  
v. Woods, 151 C. C. A. 651,  
238 Fed. 917 1204, 1208  
Atlantic & P. R. Co. v. Laird,  
164 U. S. 393 1210  
Atley v. Chesapeake & O. Ry.  
Co., 201 Fed. 591 725  
Aton Piano Co. v. Chicago, M.  
& St. P. R. Co., 152 Wis.  
156 174, 529, 583  
Atteberry v. Powell, 29 Mo. 429  
1050

[REFERENCES ARE TO PAGES]

Augusta Southern R. Co. v.  
Wrightsville & T. R. Co., 74  
Fed. 522 218  
Austin v. Central of Georgia R.  
Co., 3 Ga. App. 775 1307  
v. State, 179 U. S. 343 15,  
17, 20, 21, 24, 25, 97  
Aydlett v. Norfolk Southern  
R. Co., 172 N. C. 47 543

## B.

Bacon v. People, 227 U. S. 504  
38, 42, 263, 274  
Baer Bros. Mercantile Co. v.  
Denver & R. G. R. Co., 233  
U. S. 479 208, 217, 264, 266,  
463, 519, 746, 760, 771, 1293  
Bailey v. Missouri Pac. R. Co.,  
184 Mo. App. 457 59, 172, 543  
v. Western U. Tel. Co., —  
Tex. Civ. App. —, 171  
S. W. 839 102  
Baker v. Missouri P. Ry. Co.,  
34 Mo. App. 98 1215  
Baker Co. v. Brown, 214 Mass.  
196 744  
Baldwin v. Atlantic Coast Line  
R. Co., 170 N. C. 12 173  
v. Franks, 120 U. S. 678 48  
Baldwin Sheep & Land Co. v.  
Columbia R. Co., 58 Ore. 285  
461, 468, 770  
Baldwin & Riggs v. Chicago,  
R. I. & P. R. Co., 173 Iowa  
524 171  
Ball v. Lusk, 189 Mo. App. 297 172  
Ballenger v. Southern R. Co.,  
106 S. C. 200 990, 1132  
Ballou v. Gile, 50 Wis. 614 1107  
Baltic Min. Co. v. Com., 231 U.  
S. 68 18, 42  
Baltimore, C. & A. R. Co. v.  
William Sperber & Co., 117  
Md. 595 172, 598  
Baltimore & O. R. Co. v. Baugh,  
149 U. S. 368 952, 1265  
v. Branson, 242 U. S. 623  
776, 835, 845, 850, 1154  
v. Branson, 128 Md. 678  
694, 737, 807, 844, 850,  
916, 956, 959, 989, 1032,  
1042  
v. Darr, 124 C. C. A. 565,  
204 Fed. 751 842, 844  
v. Dever, 112 Md. 296 575  
v. Evans, 110 C. C. A. 156,  
188 Fed. 6 1178  
v. Gawinske, 116 C. C. A.  
579, 197 Fed. 31 1132

Baltimore, etc., R. Co. v. Inter-  
state Commerce Commission,  
221 U. S. 612 14, 39, 46, 51,  
186, 680, 690, 1432, 1436,  
1437, 1442, 1446  
v. Keedy, 75 Md. 320 596  
v. La Due, 128 N. Y. App.  
Div. 594 452, 458, 467  
v. Montgomery & Co., 19  
Ga. App. 29 171, 605  
v. Smith, 169 Ky. 593  
1180, 1195, 1213  
v. State, 21 Wall. (U. S.)  
456 41, 62  
v. United States, 156 C. C.  
A. 19, 243 Fed. 153  
1462, 1463, 1477  
v. United States, 154 C. C.  
A. 593, 242 Fed. 1 1447  
v. United States, 200 Fed.  
779 366  
v. United States ex rel. Pit-  
cairn Coal Co., 215 U.  
S. 481 342, 343, 345,  
463, 489, 492, 500, 635  
v. Whitacre, 242 U. S. 169 980  
v. Whitacre, 124 Md. 411  
860, 895, 926, 1009, 1030,  
1040  
v. Wilson, 242 U. S. 295  
776, 1012, 1048, 1075,  
1154, 1405  
Baltimore & O. S. W. R. Co. v.  
J. A. Wood & Co., 130 Ky.  
839 1490  
v. New Albany Box & Bas-  
ket Co., 48 Ind. App. 647  
439, 451, 457, 469  
v. Voigt, 176 U. S. 498 97,  
483, 1252  
Baltimore & P. R. Co. v. Jones,  
95 U. S. 439 926  
v. Mackey, 157 U. S. 72 952  
Bank of Garrison v. Malley, 103  
Tex. 562 929, 1267  
Bank of Kentucky v. Adams  
Exp. Co., 93 U. S. 174 237, 558  
Banker Bros. Co. v. Common-  
wealth, 222 U. S. 210 11  
Bankson v. Illinois Cent. R. Co.,  
196 Fed. 171 734, 1194, 1200,  
1230  
Banner v. Wabash R. Co., 131  
Iowa 405 457  
Barber Asphalt Paving Co. v.  
French, 158 Mo. 534 59  
Barker v. Anniston, O. & O. St.  
Ry. Co., 92 Ala. 314 1211

[REFERENCES ARE TO PAGES]

- Barker v. Kansas City, M. & O.  
     R. Co., 94 Kan. 176 763, 899  
     v. Kansas City, M. & O. R.  
     Co., 88 Kan. 767 718,  
     764, 899, 980, 1013, 1225,  
     1284, 1302  
 Barlow v. Lehigh Valley R. Co.,  
     214 N. Y. 116 899  
     v. Lehigh Valley R. Co., 158  
     N. Y. App. Div. 768 874, 893  
 Barnet v. New York Cent. & H.  
     River R. Co., 167 N. Y. App.  
     Div. 738 543  
 Barnett v. Coal & Coke Ry. Co.,  
     — W. Va. —, 94 S. E. 150 890  
 Barrett v. New York, 232 U.  
     S. 14 18, 20, 44, 56, 106, 107,  
     256, 542, 567  
     v. Northern P. R. Co., 29  
     Idaho 139 530, 604  
 Barron v. Baltimore, 7 Pet. (U.  
     S.) 243 1237  
 Barstow v. New York, N. H. &  
     H. R. Co., 158 N. Y. App. Div.  
     665 173, 530, 543  
 Barton v. Louisville & N. R.  
     Co., — Mo. App. —, 196 S.  
     W. 379 543  
 Basham v. Chicago & G. W. Ry.  
     Co., — Iowa —, 154 N. W.  
     1019 952  
 Batesville Southwestern R. Co.  
     v. Mims, 111 Miss. 574 276, 768  
 Baugham v. New York, P. & N.  
     R. Co., 241 U. S. 237 854,  
     980, 987, 1009, 1154, 1401  
 Bay v. Merrill & Ring Logging  
     Co., 243 U. S. 40 21, 272,  
     741, 761, 796  
     v. Merrill & Ring Logging  
     Co., 136 C. C. A. 277, 220  
     Fed. 295 718  
     v. Merrill & Ring Lumber  
     Co., 211 Fed. 717 202,  
     741, 854, 1285  
 Bayles v. Kansas Pac. R. Co.,  
     13 Colo. 181 327  
 Beard v. Illinois Cent. Ry. Co.,  
     79 Iowa 518 293  
 Beaumont & G. N. R. Co. v.  
     Gonzales, — Tex. Civ. App.  
     —, 163 S. W. 619 792  
 Beck v. Dowell, 40 Mo. App.  
     71 1050  
 Beecroft v. Great Northern R.  
     Co., 134 Minn. 86 916, 942
- Beekman Lumber Co. v. Acme  
     Harvester Co., 215 Mo. 221  
     929, 1267  
 Behrens v. Illinois Cent. R. Co.,  
     192 Fed. 581 807  
 Belfast, The, 7 Wall. (U. S.)  
     624 94  
 Bellenger v. Southern Ry. Co.,  
     — S. C. —, 90 S. E. 1019 1136  
 Belt R. Co. of Chicago v. United  
     States, 93 C. C. A. 666, 168  
     Fed. 542 745, 761, 770, 1284,  
     1290, 1293, 1300  
 Bement v. Grand Rapids & I.  
     Ry. Co., 194 Mich. 64 731, 1140  
 Bennett v. Great Northern R.  
     Co., 115 Minn. 128 1147  
     v. Lehigh Valley R. Co., 197  
     Fed. 578 789  
     v. Southern Ry. — Carolina  
     Division, 98 S. C. 42 734,  
     950, 1064, 1074  
 Benson, Ex parte, 18 S. C. 38  
     304, 305  
 Berg v. Atlantic Coast Line R.  
     Co., — S. C. —, 93 S. E. 390  
     1053, 1064, 1105, 1201, 1203  
 Bergin v. Missouri, K. & T. Ry.  
     Co., — Tex. Civ. App. —, 150  
     S. W. 1184 442  
 Bernard v. Adams Exp. Co., 205  
     Mass. 254 576  
 Berwind-White Coal Min. Co. v.  
     Chicago & E. R. Co., 235 U. S.  
     371 440, 442, 460  
 Best v. Great Northern R. Co.,  
     159 Wis. 429 174, 544, 564, 570  
 Bibb Broom Corn Co. v. Atchi-  
     son, T. & S. F. R. Co., 94 Minn.  
     269 596  
 Bichlmeir v. Minneapolis, St. P.  
     & S. S. M. R. Co., 159 Wis.  
     404 174, 523, 580, 599  
 Bigbee & Warrior Rivers Packet  
     Co. v. Mobile & O. R. Co., 60  
     Fed. 545 416  
 Bitondo v. New York Cent. & H.  
     River R. Co., 163 N. Y. App.  
     Div. 823 822, 827, 1103, 1208  
 Bixler v. Pennsylvania R. Co.,  
     201 Fed. 553 1143, 1215  
 Bjornsen v. Northern Pac. R.  
     Co., 84 Wash. 220 922, 943,  
     944, 959  
 Black v. Jackson, 177 U. S. 349 1237  
 Blackstock v. New York & E. R.  
     Co., 20 N. Y. 48 595  
 Blair & Jackson v. Wells, Fargo  
     & Co., 155 Iowa 190 531

[REFERENCES ARE TO PAGES]

Blake v. Midland Ry. Co., 18 Q. B. 93	1111	Bowles v. Quincy, O. & K. C. R. Co., — Mo. App. —, 187 S. W. 131	172, 267, 529, 530, 574, 583, 761, 767, 1299
Blankenbaker v. St. Louis & S. F. R. Co. (Mo.), 187 S. W. 840	917, 1042	Bowman v. Chicago & N. W. Ry. Co., 125 U. S. 465	9, 17, 21, 26, 27, 44, 294
Bledsoe v. Missouri, K. & T. R. Co., 177 Mo. App. 153	172	Box v. Chicago, R. I. & P. Ry. Co., 107 Iowa 660	1211
Bliven v. Hudson River R. Co., 36 N. Y. 403	575	Boyd v. United States, 116 U. S. 616	680
Blizzard v. Applegate, 61 Ind. 368	1050	Boyle v. Pennsylvania R. Co., 142 C. C. A. 558, 228 Fed. 266	704, 801, 857, 859
Board of Railroad Com'rs v. Market St. Ry. Co., 132 Cal. 677	231	v. Pennsylvania R. Co., 221 Fed. 453	705, 718
Board of Trustees v. Cuppett, 52 Ohio St. 567	929, 1267	Bradbury v. Chicago, R. I. & P. R. Co., 149 Iowa 51	781, 1147, 1195, 1203, 1208, 1422
Boering v. Chesapeake Beach R. Co., 193 U. S. 442	183	Brady v. Daly, 175 U. S. 148	523
Bogart v. New York Cent. & H. River R. Co., 171 N. Y. App. Div. 652	729, 908	v. Kansas City, St. L. & C. R. Co., 206 Mo. 509	1409, 1410, 1415
Boland v. Louisville & N. R. Co., 106 Ala. 641	1253	Bramlett v. Southern R. Co., 98 S. C. 319	862
Bolch v. Chicago, M. & St. P. R. Co., 90 Wash. 47	59, 706, 732, 776, 783, 799, 844, 886, 1007, 1010	Brantley Co. v. Ocean S. S. Co., 5 Ga. App. 844	457
Boldt v. New York Cent. R. Co., 18 N. Y. 432	788	Bravis v. Chicago, M. & St. P. R. Co., 133 C. C. A. 228, 217 Fed. 234	773, 784, 790, 810
v. Pennsylvania R. Co., 245 U. S. 441	982, 986, 987	Bray v. Creekmore, 109 N. C. 49	1215
Bolton v. Georgia Pac. Ry. Co., 83 Ga. 659	1211	Brechbill v. Randall, 102 Ind. 528	744
Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112	733, 967, 1055	Brennan v. City of Titusville, 153 U. S. 289	38, 42
Bosley v. Baltimore & O. R. Co., 54 W. Va. 563	576	Breske v. Minneapolis & St. L. R. Co., 115 Minn. 386	761, 843, 874, 881, 882, 1281, 1285, 1300, 1302
Boston & M. R. Co. v. Hooker, 233 U. S. 97	170, 249, 291, 443, 445, 450, 460, 463, 529, 531, 542, 558, 567	Brewster v. Chicago & N. W. Ry. Co., 114 Iowa 144	929, 1267
v. Hurd, 47 C. C. A. 615, 108 Fed. 116	1211	Brightwell v. Lusk, 194 Mo. App. 643	956, 1031, 1040
v. Piper, — U. S. —, 62 L. Ed. —, 38 Sup. Ct. 354	579	Brinkmeier v. Missouri Pac. R. Co., 224 U. S. 268	733, 1167, 1182, 1274, 1287, 1421, 1424
Bouchard v. Central Vermont R. Co., 87 Vt. 399	735, 1194, 1196	v. Missouri Pac. R. Co., 81 Kan. 101	923, 1211
Bowden v. Philadelphia, B. & W. R. Co., 5 Boyce (Del.) 146	530, 531	Brinson & Kramer v. Norfolk Southern R. Co., 169 N. C. 425	595
Bower v. Chicago & N. W. R. Co., 96 Neb. 419	862, 968, 979, 1224	Bristol Distributing Co. v. Southern Exp. Co., 117 Va. 7	33
Bowers v. Southern R. Co., 10 Ga. App. 367	733, 737, 946	Brockman Commission Co. v. Missouri Pac. R. Co., 195 Mo. App. 607	172, 543, 607
		Brodnax v. State, 219 U. S. 285	13
		Brooklyn Eastern Dist. Terminal v. United States, 152 C. C. A. 275, 239 Fed. 287	1434, 1435

[REFERENCES ARE TO PAGES]

Brooks v. Southern Pac. Co., 148 Fed. 986 691 v. Yazoo & M. V. R. Co., 111 Miss. 793 1073	Burnett v. Erie R. Co., 159 N. Y. App. Div. 712 723 v. Spokane, P. & S. Ry. Co., 210 Fed. 94 1148
Broom v. Southern Ry. Co. in Mississippi, 115 Miss. 493 1218	Bush v. Keystone Driller Co., — Mo. App. —, 199 S. W. 597 471
Brown v. Adams Exp. Co., 15 W. Va. 812 304 v. Mann, 68 Cal. 517 1211 v. Maryland, 12 Wheat. (U. S.) 419 4, 19, 21, 24, 51 v. Walker, 161 U. S. 591 163, 680	Butchers' & Drovers' Stock- Yards Co. v. Louisville & N. R. Co., 14 C. C. A. 290, 67 Fed. 35 174 Butler v. Frazee, 211 U. S. 459 987 Butler Bros. Shoe Co. v. United States Rubber Co., 84 C. C. A. 167, 156 Fed. 1 9
Brown & Brown Coal Co. v. Grand Trunk Ry. System, 159 Mich. 565 369	Butts v. Merchants' & Miners' Transp. Co., 230 U. S. 126 49
Browning v. City of Wayercross, 233 U. S. 16 11, 17, 18, 20, 23	Byram v. Illinois Cent. R. Co., 172 Iowa 631 860, 863, 938, 1030
Bruckshaw v. Chicago, R. I. & P. R. Co., 173 Iowa 207 763, 783, 799, 843, 854, 860, 873, 881, 1102	<b>C.</b>
Brunson & Boatwright v. Atlan- tic Coast Line R. Co., 76 S. C. 9 593	Caha v. United States, 152 U. S. 211 1422
Bryan v. Louisville & N. R. Co., — N. C. —, 93 S. E. 750 563, 584	Cain v. Southern Ry. Co., 199 Fed. 211 1031, 1063, 1074, 1075
Buck Stove & Range Co. v. Vickers, 226 U. S. 205 18, 44	Caldwell v. North Carolina, 187 U. S. 622 8, 11, 17, 21, 22
Buerstetta v. Tecumseh Nat. Bank, 57 Neb. 504 1211	Calhoun v. Great Northern R. Co., 162 Wis. 264 922, 943, 945, 1064, 1196, 1205, 1308, 1366, 1368, 1372
Bullard v. Northern Pac. R. Co., 10 Mont. 168 317	Callahan v. Chicago & N. W. R. Co., 161 Wis. 288 737
Bullock v. Crutcher, — Tex. Civ. App. —, 180 S. W. 940 1181	Camden Iron Works v. United States, 85 C. C. A. 585, 158 Fed. 561 212
Bumstead v. Missouri Pac. R. Co., 99 Kan. 589 788, 795, 854, 863	Caminetti v. United States, 242 U. S. 470 50, 51
Buntin v. Chicago, R. I. & P. Ry. Co., 41 Fed. 744 1215	Camp v. Atlanta & C. Air Line R. Co., 100 S. C. 294 799, 815, 1181, 1199
Burho v. Minneapolis & St. L. R. Co., 121 Minn. 326 800, 1271, 1288, 1307, 1343, 1349, 1358, 1361	Campbell v. Campbell, 133 Cal. 33 1211 v. Canadian Northern R. Co., 124 Minn. 245 750
Burke v. Chicago & N. W. R. Co., 131 Minn. 209 855 v. Union Pac. R. Co., — N. Y. App. Div. —, 166 N. Y. Supp. 100 543, 608	v. Chicago, M. & St. P. Ry. Co., 86 Iowa 587 766, 1299 v. City of Haverhill, 155 U. S. 610 523, 1423 v. Spokane & I. E. R. Co., 188 Fed. 516 1307
Burkenroad Goldsmith Co. v. Illinois Cent. R. Co., 138 La. 81 172, 530, 541	Canadian Pac. R. Co. v. Thomp- son, 146 C. C. A. 401, 232 Fed. 353 810, 830
Burlington, C. R. & N. Ry. Co. v. Northwestern Fuel Co., 31 Fed. 652 142, 306, 326, 328	Cantin v. Glen Junct. Transfer Co., — N. H. —, 96 Atl. 303 705, 722, 739, 857
Burnett v. Atlantic Coast Line R. Co., 163 N. C. 186 708, 735, 1132, 1139	Capital City Dairy Co. v. State, 183 U. S. 238 13

[REFERENCES ARE TO PAGES]

- Capital Trust Co. v. Great Northern R. Co., 127 Minn. 144 1072
- Carden v. Louisville & N. R. R., 101 Ky. 113 1142
- Cardwell v. American Bridge Co., 113 U. S. 205 47
- Carey v. Grand Trunk Western R. Co., — Mich. — 166 N. W. 492 723, 728
- Carlisle v. Missouri Pac. Ry. Co., 168 Mo. 652 498, 500, 522
- Carlton Produce Co. v. Velasco, B. & N. Ry. Co., — Tex. Civ. App. —, 131 S. W. 1187 601
- Carnegie, Phipps & Co. v. Hulbert, 16 C. C. A. 498, 70 Fed. 209 1215
- Carolina, C. & O. R. Co. v. Shewalter, 128 Tenn. 363 1064, 1066, 1071, 1201
- v. Stroup, 152 C. C. A. 125, 239 Fed. 75 799, 925
- Carpenter v. Baltimore & O. R. Co., 6 Pennw. (Del.) 15 242
- v. Central Vermont R. Co., 90 Vt. 35 703, 862, 870, 1204, 1205, 1208
- v. Kansas City Southern R. Co., 189 Mo. App. 164 1049, 1050, 1051, 1180, 1196, 1204, 1405
- Carr v. Chicago, R. I. & P. R. Co., 173 Iowa 444 600
- v. New York Cent. & H. River Co., 77 N. Y. Misc. 346 870
- v. Pennsylvania R. Co., 88 N. J. L. 235 452, 585
- v. Schafer, 15 Colo. 48 293
- Carrigan v. Union Pac. R. Co., — Iowa —, 162 N. W. 571 955
- Carson v. Southern Ry., 68 S. C. 55 1307, 1311
- Carter v. Atlantic Coast Line R. Co., — S. C. —, 95 S. E. 357 944
- v. Kansas City Southern Ry. Co., — Tex. Civ. App. —, 155 S. W. 638 737, 1015, 1027
- Case of State Freight Tax, 15 Wall. (U. S.) 232 38, 42
- Castonguay v. Grand Trunk Ry. Co., — Vt. —, 100 Atl. 908 706, 732, 799, 836, 838
- Castonia v. Maine Cent. R. R., — N. H. —, 100 Atl. 601 855, 917, 986, 989, 994, 1010
- Cau v. Texas & P. R. Co., 194 U. S. 427 593, 596
- Cavallaro v. Texas & P. Ry. Co., 110 Cal. 348 538
- Caverhill v. Boston & M. R. R., 77 N. H. 330 737, 917, 993
- Cedar Rapids Fuel Co. v. Illinois Cent. R. Co., — Iowa —, 160 N. W. 353 171, 451, 542
- Central of Georgia R. Co. v. Birmingham Sand & Brick Co., 9 Ala. App. 419 451, 457, 467, 470
- v. Broda, 190 Ala. 266 531, 541
- v. Curtis, 14 Ga. App. 716 451, 457, 461, 467
- v. De Loach, 18 Ga. App. 362 916, 946
- v. Murphey, 196 U. S. 194 537
- v. O'Neill Mfg. Co., 19 Ga. App. 490 438
- v. Patterson, 12 Ala. App. 369 171, 531, 577
- v. Patterson, 6 Ala. App. 494 451, 456
- v. Sims, 169 Ala. 295 171, 541, 552, 592
- v. Southern Ferro Concrete Co., 193 Ala. 108 457
- v. Waxelbaum Produce Co., 18 Ga. App. 489 542, 598
- v. Yesbik, 146 Ga. 769 542
- Central R. Co. of New Jersey v. Colasurdo, 113 C. C. A. 379, 192 Fed. 901 718, 821, 835, 974
- v. Mauser, 241 Pa. 603 439, 452, 456, 458, 468
- v. Paslick, 152 C. C. A. 547, 239 Fed. 713 704, 846
- v. United States, 143 C. C. A. 569, 229 Fed. 501 451
- Central Railroad & Banking Co. v. Strickland, 90 Ga. 562 419
- Central Stock Yards Co. v. Louisville & N. R. Co., 192 U. S. 568 91, 177, 237, 284
- Central Vermont R. Co. v. Bethune, 124 C. C. A. 528, 206 Fed. 868 1013
- v. United States, 123 C. C. A. 308, 205 Fed. 40 1359
- v. White, 238 U. S. 507 58, 60, 138, 731, 733, 735, 737, 854, 933, 950, 986, 987, 1018, 1050, 1051, 1073, 1129, 1130, 1138, 1155, 1160, 1162, 1167, 1244

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89 N. J. L. 691 989
- Chadwick v. Oregon-Washing-  
ton R. & Nav. Co., 74 Ore. 19 1032
- Chafin v. Norfolk & W. Ry.  
Co., — W. Va. —, 93 S. E.  
822 1066, 1079
- Chambers v. Baltimore & O. R.  
Co., 207 U. S. 142 1155
- Champion v. Ames, 188 U. S.  
321 8, 10, 50, 51
- Chandler v. St. Louis & S. F.  
R. Co., 127 Mo. App. 34 929, 1267
- Chapman v. Ann Arbor R. Co.,  
— Mich. —, 163 N. W. 107 981, 989
- v. United States Exp. Co.,  
192 Mich. 654 758, 942,  
956, 989
- Charge to Grand Jury, In re,  
151 Fed. 834 10
- Charleston & W. C. R. Co v.  
Anchors, 10 Ga. App. 322  
803, 821, 823
- v. Brown, 13 Ga. App. 744  
732, 919, 932, 942, 946,  
965, 1030, 1180, 1195
- v. Sylvester, 17 Ga. App. 85  
942, 955, 959, 980, 989,  
1009, 1030, 1401
- v. Thompson, 234 U. S. 576 183
- v. Thompson, 13 Ga. App.  
528 451
- v. Varnville Furniture Co.,  
237 U. S. 597 45, 80,  
170, 541, 545, 594, 602
- Charlotte, C. & A. R. Co. v.  
Gibbes, 142 U. S. 386 70
- Charnock v. Texas & P. R. Co.,  
194 U. S. 432 918, 927
- Cheney Piano Action Co. v.  
New York Cent. & H. River  
R. Co., 166 N. Y. App. Div.  
706 173
- Cherokee Nation v. Southern  
Kansas Ry. Co., 135 U. S. 641 90
- Cherokee & P. Coal & Mining  
Co. v. Limb, 47 Kan. 469 1095
- Cherpeski v. Great Northern  
R. Co., 128 Minn. 360 799,  
822, 827, 831, 834
- Cherry v. Atlantic Coast Line  
R. Co., — N. C. —, 93 S. E.  
783 824
- Chesapeake Western Ry. v.  
Shiflett's Adm'r, 118 Va. 63  
917, 1041
- Chesapeake & O. Ry. Co. v. Am-  
erican Exch. Bank, 92 Va. 495  
1488, 1489
- v. Carnahan, 241 U. S. 241  
1124, 1238
- v. Carnahan, 118 Va. 46  
1147, 1149
- v. Com., 179 U. S. 388 420
- v. Conley, 230 U. S. 513 73
- v. Cooper, 168 Ky. 137  
1030, 1044, 1050, 1051
- v. De Atley, 241 U. S. 310  
733, 737, 980, 987, 988,  
993, 996, 1092
- v. De Atley, 159 Ky. 687  
1009, 1401
- v. Dwyer's Adm'r, 157 Ky.  
590 1065, 1091, 1201
- v. Gainey, 241 U. S. 494  
1063, 1064, 1073, 1074, 1076
- v. Harmon's Adm'r, 173  
Ky. 1 705, 718, 775, 788
- v. Hawkins, 98 C. C. A. 443,  
174 Fed. 597 467
- v. Kelly, 241 U. S. 485 733,  
1063, 1064, 1073, 1076, 1154
- v. Kelly's Adm'r, 161 Ky.  
655 733, 1197, 1238
- v. Kelly's Adm'r, 160 Ky.  
296 1077
- v. Kornhoff, 167 Ky. 353  
731, 825, 855
- v. McDonald, 214 U. S. 191 1155
- v. McLaughlin, 242 U. S.  
142 170, 530, 569
- v. Maysville Brick Co., 132  
Ky. 643 452, 467
- v. Meadows, 119 Va. 33  
734, 981, 988, 990, 1007,  
1031, 1040
- v. Proffitt, 241 U. S. 462  
854, 980, 987, 990, 1154
- v. Proffitt, 134 C. C. A. 37,  
218 Fed. 23 1025
- v. Public Service Commis-  
sion of West Virginia,  
242 U. S. 603 83
- v. Shamblen, 166 Ky. 789 873
- v. Shaw, 168 Ky. 537 854,  
857, 873, 884, 1147, 1149,  
1184, 1238
- v. Standard Lumber Co., 98  
C. C. A. 81, 174 Fed. 107  
371, 456
- v. United States, 141 C. C.  
A. 439, 226 Fed. 683  
1319, 1338
- v. Walker's Adm'r, 159 Ky.  
237 980

[REFERENCES ARE TO PAGES]

Chesapeake & O. Ry. Co. of Indiana v. Jordan, — Ind. App. —, 114 N. E. 461 171, 529, 542	Chicago Great Western R. Co. v. McDonough, 88 C. C. A. 517, 161 Fed. 657 928
Chesapeake & P. Tel. Co. v. Manning, 186 U. S. 238 245	Chicago, I. & L. R. Co. v. Hack- ett, 228 U. S. 559 706, 742
Chicago, B. & Q. R. Co. v. Big- ley, 1 Neb. (Unoff.) 225, 95 N. W. 344 1240	v. United States, 219 U. S. 486 39, 82, 436, 438, 439, 450, 475, 480, 481
v. City of Chicago, 166 U. S. 226 70, 518	v. Woodward, 164 Ind. 360 594
v. Cram, 228 U. S. 70 39, 87	Chicago Junct. R. Co. v. Indus- trial Board of Illinois, 277 Ill. 512 722, 882
v. Curtis, 51 Neb. 442 1253	v. King, 222 U. S. 222 1162, 1167, 1302, 1340, 1352
v. Feintuch, 112 C. C. A. 126, 191 Fed. 482 438, 479	v. King, 94 C. C. A. 652, 129 Fed. 372 1323, 1325, 1343
v. Harrington, 241 U. S. 177 704, 767, 777, 779, 782, 827, 828, 833, 836, 850, 884, 887, 899, 1154	Chicago, K. & S. R. Co. v. Kindlesparker, — U. S. —, 62 L. Ed. —, 38 Sup. Ct. 425 845
v. Iowa, 94 U. S. 155 63, 70, 71, 72	v. Kindlesparker, 148 C. C. A. 17, 234 Fed. 1 745, 746, 784
v. Jones, 149 Ill. 361 744, 1215	Chicago, M. & P. S. Ry. Co. v. United States, 116 C. C. A. 444, 196 Fed. 882 1281, 1324, 1356, 1380
v. Kyle, 228 U. S. 85 87	Chicago, M. & St. P. R. Co. v. Ackley, 94 U. S. 179 63, 70, 71, 72
v. McGuire, 219 U. S. 549 50, 1132	v. Minnesota, 134 U. S. 418 69, 70, 72, 73, 157
v. Miller, 226 U. S. 513 39, 81, 170, 542, 545, 608	v. Moore, 92 C. C. A. 357, 166 Fed. 663 928
v. Parks, 18 Ill. 460 304	v. Rock County Sugar Co., 162 Wis. 374 548
v. People ex rel. Drainage Com'rs, 200 U. S. 561 25, 70	v. Solan, 169 U. S. 133 40, 46, 57, 93, 97, 536, 706, 743
v. Railroad Commission of Wisconsin, 237 U. S. 220 48, 83, 87, 88	v. State, 238 U. S. 491 68, 83, 259
v. Richardson, 121 C. C. A. 144, 202 Fed. 836 944	v. State, 233 U. S. 334 18 69, 275, 770
v. Slattey, 76 Neb. 721 1489	v. State Public Utilities Commission of Illinois, 242 U. S. 333 72
v. Tompkins, 176 U. S. 167 70	v. Tompkins, 176 U. S. 167 393
v. United States, 220 U. S. 559 923, 1310, 1322, 1338, 1340, 1352, 1368, 1383, 1426	v. United States, 91 C. C. A. 373, 165 Fed. 423 763, 843, 884, 1281, 1286, 1294, 1300, 1302, 1304, 1305, 1310, 1352, 1398
v. United States, 127 C. C. A. 438, 211 Fed. 12 1332, 1343, 1352, 1359, 1386, 1387, 1388, 1390, 1391	v. Voelker, 65 C. C. A. 226, 129 Fed. 522 770, 842, 1266, 1284, 1286, 1353, 1358, 1401, 1403, 1421
v. United States, 115 C. C. A. 193, 195 Fed. 241 1421, 1471, 1486	Chicago, R. I. & G. Ry. Co. v. Cosio, — Tex. Civ. App. —, 182 S. W. 83 704, 719, 799, 858, 1031, 1181, 1187, 1196, 1197
v. United States, 114 C. C. A. 334, 194 Fed. 342 1489, 1490	
v. United States, 95 C. C. A. 642, 170 Fed. 556 1319	
v. United States, 85 C. C. A. 194, 157 Fed. 830 218, 451, 482	
Chicago Great Western R. Co. v. McCormick, 118 C. C. A. 527, 200 Fed. 375 1040	



[REFERENCES ARE TO PAGES]

- Chicago, etc., Ry. Co. v. De  
Bord, — Tex. —, 192 S. W.  
767 723, 779, 855, 981, 985,  
990, 1010, 1012, 1032, 1196, 1401  
v. Jenkins, — Tex. Civ.  
App. —, 196 S. W. 679 544  
v. Rogers, — Tex. Civ.  
App. —, 150 S. W. 281 1208  
v. Scott, — Tex. Civ. App.  
—, 156 S. W. 294 541  
v. Trout, — Tex. Civ. App.  
—, 152 S. W. 1137 741, 810  
v. Whaley, — Tex. Civ.  
App. —, 190 S. W. 833 173  
Chicago, R. I. & P. Ry. Co. v.  
Bond, 240 U. S. 449 730,  
900, 1131, 1154, 1269  
v. Bond, 47 Okla. 161 909  
v. Brown, 229 U. S. 317  
922, 923, 1307, 1351,  
1407, 1411, 1413, 1415  
v. Brown, 107 C. C. A. 300,  
185 Fed. 80 1265  
v. Bruce, — Okla. —, 150  
Pac. 880 173, 744  
v. Cramer, 232 U. S. 490  
46, 56, 80, 170, 451, 542,  
544, 559, 567  
v. Devine, 239 U. S. 52 721,  
723, 731, 946, 1125, 1155,  
1160  
v. Felder, — Okla. —, 155  
Pac. 529 703, 776, 799,  
917, 981  
v. Hamler, 215 Ill. 525 757  
v. Hardwick Farmers Ele-  
vator Co., 226 U. S. 426  
75, 208, 283, 284, 706,  
761, 763, 886, 1284, 1300  
v. Harrington, 44 Okla. 41  
173, 601  
v. Hubbell, 54 Kan. 232  
316, 452, 457  
v. Hughes, — Okla. —, 166  
Pac. 411 855, 981, 1196  
v. Industrial Board of Illi-  
nois, 273 Ill. 528 705,  
781, 902  
v. Jackson, — Okla. —,  
160 Pac. 736 723, 981,  
985, 990, 1010, 1401  
v. McBee, 45 Okla. 192 781,  
1147, 1181, 1182, 1225  
v. Miles, 92 Ark. 573 171  
v. Parsons, — Okla. —, 162  
Pac. 955 559  
v. Pearce, 118 Ark. 6 722, 1131  
v. Ray, — Okla. —, 168  
Pac. 999 1307
- Chicago, etc., Ry. Co. v. State,  
219 U. S. 453 39, 45, 56, 93,  
99, 100  
v. State, 86 Ark. 412 743  
v. State, — Okla. —, 157  
Pac. 1039 77, 744  
v. Theis, 96 Kan. 494 452  
v. United States, 141 C. C.  
A. 135, 226 Fed. 27  
1435, 1462, 1466  
v. Wehrman, 25 Okla. 147 574  
v. Wright, 239 U. S. 548  
721, 723, 724, 728, 763,  
766, 777, 805, 842, 854,  
915, 1034, 1042, 1160,  
1189, 1243, 1245  
v. Wynn, — Okla. —, 153  
Pac. 880 543  
Chicago, St. L. & N. O. R. Co.  
v. Pullman Southern Car  
Co., 139 U. S. 79 339, 1473  
Chicago, St. P., M. & O. Ry. Co.  
v. Elliott, 5 C. C. A. 347, 55  
Fed. 949 945  
v. Latta, 226 U. S. 519 81,  
170, 542, 545, 567, 608  
Chicago & A. R. Co. v. Allen,  
— C. C. A. —, 249 Fed. 280 846  
v. Kirby, 225 U. S. 155  
154, 326, 358, 436, 442,  
444, 450, 456, 459, 460, 592  
v. People ex rel. Koerner,  
67 Ill. 11 304  
v. Shannon, 43 Ill. 338 1095  
v. United States, 212 U. S.  
563 165, 654  
v. United States, 157 C. C.  
A. 295, 244 Fed. 945  
1435, 1462, 1467  
v. United States, 84 C. C. A.  
324, 156 Fed. 558 437, 456  
v. Wagner, 239 U. S. 452  
1131, 1162  
v. Wiggins Ferry Co., 108  
U. S. 18 1416  
Chicago & E. I. R. Co. v. Collins  
Produce Co., 149 C. C. A. 169,  
235 Fed. 857 171, 542, 572  
Chicago & E. R. Co. v. Freight-  
ner, — Ind. App. —, 114 N.  
E. 659 703, 718, 763, 767,  
775, 781, 854, 857, 870, 873,  
942, 1180, 1226  
v. Mitchell, — Ind. App. —,  
110 N. E. 78 916, 1180  
v. Steele, 183 Ind. 444  
810, 812, 821  
v. Webb, — Ind. App. —,  
113 N. E. 748 914

[REFERENCES ARE TO PAGES]

- Chicago & G. T. Ry. Co. v. Well-  
man, 143 U. S. 339 70, 73  
Chicago & N. W. Ry. Co. v.  
Bower, 241 U. S. 470 842,  
860, 901, 914, 915, 918, 927,  
980, 987, 988, 994, 1154  
v. Fuller, 17 Wall. (U. S.)  
560 9, 97  
v. Gray, 237 U. S. 399  
733, 1189, 1243  
v. O'Brien, 67 C. C. A. 421,  
132 Fed. 593 952  
v. Osborne, 3 C. C. A. 347,  
52 Fed. 912 177, 207  
v. United States, 148 C. C.  
A. 170, 234 Fed. 268 1477  
v. United States, 141 C. C.  
A. 138, 226 Fed. 30  
1435, 1462, 1465  
v. United States, 93 C. C.  
A. 450, 168 Fed. 236  
881, 1284, 1288, 1302, 1398  
v. Wilcox, 54 C. C. A.  
147, 116 Fed. 913 1135  
v. William S. Stein Co., 233  
Fed. 716 450, 475  
Childers v. Adams, 42 Ga. 352  
1215  
Chiles v. Chesapeake & O. R.  
Co., 218 U. S. 71 39  
Choctaw, O. & G. R. Co. v. Hol-  
loway, 191 U. S. 334 945,  
1327  
v. McDade, 191 U. S. 64  
987, 1013, 1025  
Cholerton v. Detroit, J. & C.  
Ry. Co., — Mich. —, 165 N.  
W. 606 753  
Christie v. Missouri Pac. Ry.  
Co., 94 Mo. 453 306, 317  
Christl v. Missouri Pac. R. Co.,  
92 Kan. 580 171, 452, 461  
Christy v. Wabash R. Co., 195  
Mo. App. 232 874, 881, 922,  
1009, 1049, 1075, 1180, 1307,  
1310, 1344, 1405, 1422  
Chrosciel v. New York Cent. &  
H. River R. Co., 174 N. Y.  
App. Div. 175 812, 841, 1204  
Church v. Minneapolis & St. L.  
Ry. Co., 14 S. D. 443 317,  
453, 458  
Cincinnati, H. & D. Ry. Co. v.  
Gross, — Ind. —, 114 N. E.  
962 854, 1030, 1032, 1042  
v. Gross, — Ind. App. —,  
111 N. E. 653 718, 775,  
807, 980, 1009, 1018,  
1180, 1183, 1184, 1199, 1401  
Cincinnati, etc., Ry. Co. v. Inter-  
state Commerce Commission,  
206 U. S. 142 326, 401, 403, 404  
v. Quincy & Rogers, 19 Ga.  
App. 167 542  
Cincinnati, N. O. & T. P. Ry.  
Co. v. Bonham, 130 Tenn. 435  
1171, 1173, 1175, 1209  
v. Clarke, 169 Ky. 662 705,  
724, 1194, 1231, 1232  
v. Claybourne's Adm'r, 169  
Ky. 315 822, 980, 989,  
1088, 1129  
v. Goldston, 163 Ky. 42 916  
v. Goldston, 156 Ky. 410  
916, 926, 989  
v. Goode, 163 Ky. 60 1030,  
1042, 1213, 1215  
v. Goode, 155 Ky. 153 267,  
767, 856  
v. Goode, 153 Ky. 247 856, 860  
v. Hall, 155 C. C. A. 606,  
243 Fed. 76 915, 1009  
v. Hansford, 173 Ky. 126  
775, 798, 799, 822, 827,  
829, 1057  
v. Hill, 161 Ky. 237 973  
v. Interstate Commerce  
Commission, 162 U. S.  
184 154, 157, 207, 217,  
285, 318, 383, 651, 743, 762  
v. Nolan, 161 Ky. 205 59  
v. Perkins' Adm'r, 177 Ky.  
88 944  
v. Rankin, 241 U. S. 319  
138, 170, 438, 450, 529,  
530, 531, 541, 558, 573  
v. Rankin, 153 Ky. 730  
530, 543  
v. Slade, 216 U. S. 78 1155  
v. South Fork Coal Co., 71  
C. C. A. 316, 139 Fed.  
528 952  
v. Swann's Adm'r, 160 Ky.  
458 959  
v. Thompson, 149 C. C. A.  
211, 236 Fed. 1 980, 987, 996  
v. Tucker, 168 Ky. 144 703,  
705, 822, 827, 855, 1053,  
1180, 1184, 1195, 1200, 1204  
v. Wheeler, 160 Ky. 215 971  
v. Wilson's Adm'r, 161 Ky.  
640 937  
v. Wilson's Adm'r, 157 Ky.  
460 1060, 1200  
v. York, 176 Ky. 9 989, 1009  
Cincinnati, P., B. S. & P.  
Packet Co. v. Catlettsburg,  
105 U. S. 559 45

[REFERENCES ARE TO PAGES]

- Civil Rights Cases, 109 U. S. 3 48, 50,  
 Claffin v. Houseman, 93 U. S. 130 1416, 1417  
 Clapper v. Dickinson, 137 Minn. 415 1009  
 Clark v. Chicago Great Western R. Co., 170 Iowa 452 799, 810, 821, 824  
 v. Erie R. Co., 230 Fed. 478 860, 873, 922, 942, 1009, 1010, 1049  
 v. Southern Pac. Co., 175 Fed. 122 1180, 1196  
 Clark Distilling Co. v. Western Maryland R. Co., 242 U. S. 311 14, 15, 20, 32, 50  
 Clegg v. St. Louis & S. F. R. Co., 122 C. C. A. 273, 203 Fed. 971 456  
 Cleveland, C., C. & St. L. Ry. Co. v. Backus, 154 U. S. 439 680  
 v. Baker, 33 C. C. A. 468, 91 Fed. 224 1401, 1407, 1408  
 v. Dettlebach, 239 U. S. 588 138, 170, 249, 300, 529, 541, 567, 586, 592, 608, 950, 986  
 v. Hayes, 181 Ind. 87 171, 437, 530, 532, 542  
 v. Hirsch, 123 C. C. A. 145, 204 Fed. 849 438, 450  
 v. People, 177 U. S. 514 43, 83, 743  
 v. Talge Mahogany Co., — Ind. —, 112 N. E. 890 451, 461, 467  
 v. Young, 175 Ky. 841 547  
 Cleveland & W. Coal Co. v. Pennsylvania Coal Co., — Ohio St. —, 119 N. E. 367 493  
 Clingan v. Cleveland, C., C. & St. L. Ry. Co., 184 Ill. App. 202 542  
 Clough & Co. v. Boston & M. R. R., 77 N. H. 222 452, 456, 458  
 Coad v. Chicago, St. P., M. & O. R. Co., 171 Iowa 747 457  
 Coal & Coke Co. v. Deal, 145 C. C. A. 490, 231 Fed. 604 775 852, 919, 927  
 Coate Bros. v. New Orleans Terminal Co., 139 La. 958 598  
 Coe v. Errol, 116 U. S. 517 21, 38, 265, 272, 273, 283, 741, 761, 886  
 Coeur d'Alene & S. R. Co. v. Union Pac. Co., 49 Wash. 244 467  
 Cohens v. Virginia, 6 Wheat. (U. S.) 264 206  
 Colasurdo v. Central R. R. of New Jersey, 180 Fed. 832 773, 804, 823, 894, 966, 974, 975, 976, 1026, 1031  
 Colby v. American Exp. Co., 77 N. H. 548 172  
 Cole v. Atchison, T. & S. F. R. Co., 97 Kan. 461 807, 1180  
 v. Atchison, T. & S. F. R. Co., 92 Kan. 132 705, 722, 1208  
 Coleman v. Illinois Cent. R. Co., 132 Minn. 22 922, 1310, 1365, 1368, 1373, 1375  
 Collier v. Wabash R. Co., — Mo. App. —, 190 S. W. 969 543, 598, 761  
 Collins v. Denver & R. G. R. Co., 181 Mo. App. 213 573, 595  
 v. Michigan Cent. R. Co., 193 Mich. 303 798, 810, 852, 1032, 1042  
 v. Pennsylvania R. Co., 163 N. Y. App. Div. 452 917, 1074, 1093, 1104, 1105, 1129  
 Colorado Coal & Iron Co. v. Lamb, 6 Colo. App. 255 1094  
 Columbia & P. S. R. Co. v. Sauter, 139 C. C. A. 150, 223 Fed. 604 814, 821, 832, 834, 1009, 1012, 1401  
 Columbus Iron & Steel Co. v. Kanawha & M. R. Co., 101 C. C. A. 621, 178 Fed. 261 640  
 Com. v. Mulhall, 162 Mass. 496 744  
 v. White, 166 Ky. 528 33  
 Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health, 186 U. S. 380 47  
 Concord & P. R. Co. v. For-saith, 59 N. H. 122 328  
 Conley v. Chicago, B. & Q. R. Co., 192 Mo. App. 534 172, 543  
 v. Mathieson Alkali Works, 190 U. S. 406 550  
 Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457 680  
 Connelly v. Central R. Co. of New Jersey, 238 Fed. 932 1146  
 Consolidated Rendering Co. v. State, 207 U. S. 541 680  
 Continental Paper Bag Co. v. Maine Cent. R. Co., 115 Me. 449 172, 543, 934  
 Cook v. Chicago, B. I. & P. Ry. Co., 81 Iowa 551 328

[REFERENCES ARE TO PAGES]

Cook v. Marshall County, 196 U. S. 261	21, 24, 25
v. Minneapolis, St. P. & S. S. M. Ry. Co., 98 Wis. 624	596
v. Northern Pac. R. Co., 32 N. D. 340	173, 531, 543, 547, 576
v. Pennsylvania, 97 U. S. 566	21
v. Union Pac. R. Co., — Iowa —, 158 N. W. 521	1307, 1373, 1401
Cooley v. Board Wardens Port of Philadelphia, 12 How. (U. S. ) 299	690
Covert v. Spokane, P. & S. R. Co., 80 Wash. 87	81, 531, 592
Copp v. Louisville & N. R. Co., 50 Fed. 164	523
v. Louisville & N. R. Co., 43 La. Ann. 511	523, 499
Coppage v. State of Kansas, 236 U. S. 1	14
Copper River & N. W. R. Co. v. Heney, 128 C. C. A. 131, 211 Fed. 459	750, 966
v. Reed, 128 C. C. A. 39, 211 Fed. 111	962
Corbett v. Boston & M. R. R., 219 Mass. 351	705, 722, 725, 775, 1147, 1233, 1236
Corcoran v. Louisville & N. R. Co., 125 Ky. 634	762
Corico v. Smith, 97 N. Y. Misc. 447	914
Corson v. Maryland, 120 U. S. 502	11
Cotting v. Godard, 183 U. S. 79	73
Cotton v. Rand, 93 Tex. 7	1211
Cound v. Atchison, T. & S. F. Ry. Co., 173 Fed. 527	714, 758, 1196
Counselman v. Hitchcock, 142 U. S. 547	162, 680
Coupland v. Housatonic R. Co., 61 Conn. 531	575
Cousins v. Illinois Cent. R. Co., 126 Minn. 172	909
Covington Stock-Yards Co. v. Keith, 139 U. S. 128	237, 265, 272, 283, 582, 763, 886
Covington & C. Bridge Co. v. Com., 154 U. S. 204	9, 38, 43, 44, 48, 227
Cowden v. Pacific Coast S. S. Co., 94 Cal. 470	94, 267, 305, 767
Cowley v. Northern Pac. R. Co., 68 Wash. 558	316, 440
Cownie Glove Co. v. Merchants' Dispatch Transp. Co., 130 Iowa 327	242
Cox v. Pennsylvania R. Co., 240 Pa. 27	78
Coyle v. Southern Ry. Co., 112 Ga. 121	419
Coyne v. Pennsylvania R. Co., 87 N. J. L. 257	822
Cramer v. Chicago, M. & St. P. R. Co., 134 Minn. 61	874, 922, 1238, 1307, 1310
v. Chicago, R. I. & P. R. Co., 153 Iowa 103	541
Crandall v. Chicago Great Western R. Co., 127 Minn. 498	718, 783, 860, 874, 974, 1224
v. State, 6 Wall. (U. S. ) 35	19, 38
Crane Iron Works v. United States, 209 Fed. 238	237
Crane R. Co. v. Central R. Co. of New Jersey, 248 Pa. 333	203, 439
v. Philadelphia & R. R. Co., 253 Pa. 246	458
Cranor v. Southern R. Co., 13 Ga. App. 86	171
Crapo v. City of Syracuse, 183 N. Y. 395	1142
Crenshaw v. State, 227 U. S. 389	12, 18, 38, 42, 680
Crescent Brewing Co. v. Oregon Short Line R. Co., 24 Idaho 106	267, 767
Cresswill v. Grand Lodge K. & P. of Georgia, 225 U. S. 246	1160, 1161
Creteau v. Chicago & N. W. R. Co., 113 Minn. 418	1184
Crevilli v. Chicago, M. & St. P. R. Co., 98 Wash. 42	1057
Cross v. Chicago, B. & Q. R. Co., 191 Mo. App. 202	59, 844, 935, 981, 988, 1031, 1042, 1045
v. Chicago, B. & Q. R. Co. (Mo. App. ), 186 S. W. 1130	994
v. Kansas City, Ft. S. & M. Ry. Co., 56 Mo. App. 664	420
Crossman v. Lurman, 192 U. S. 189	57, 97
Crotty v. Chicago Great Western R. Co., 95 C. C. A. 91, 169 Fed. 593	1215
Crutcher v. Kentucky, 141 U. S. 47	18, 106

[REFERENCES ARE TO PAGES]

Cryder v. Chicago, R. I. & P. R. Co., 81 C. C. A. 559, 152 Fed. 417 952	Davis v. Guarnieri, 45 Ohio St. 470 1111
Cudahy Packing Co. v. Atchison, T. & S. F. R. Co., 193 Mo. App. 572 172, 530, 572, 574, 575. 595	v. Mills, 194 U. S. 451 1138
v. Grand Trunk Western R. Co., 131 C. C. A. 401, 215 Fed. 93 180, 291, 292, 442, 456	v. Minneapolis & St. L. R. Co., 134 Minn. 455 1307
Culp v. Steere, 47 Kan. 746 1215	v. Minneapolis & St. L. R. Co., 134 Minn. 369 922, 1310, 1343
v. Virginian Ry. Co., — W. Va. —, 92 S. E. 236 737, 1032, 1040	v. Norfolk Southern R. Co., 172 N. C. 209 543, 584
v. Virginian Ry. Co., 77 W. Va. 125 915, 917, 960, 1065	v. Southern Ry. Co., — N. C. —, 96 S. E. 41 1048
Cummings v. Chicago, 188 U. S. 410 47	v. Wabash, St. L. & P. Ry. Co., 89 Mo. 340 574
Currie v. Seaboard Air Line R. Co., 156 N. C. 432 576	Davis' Adm'r v. Cincinnati, N. O. & T. P. R. Co., 172 Ky. 55 722, 798, 854, 1039, 1053, 1054, 1063, 1065, 1074, 1090
Curtis v. Delaware, L. & W. R. Co., 74 N. Y. 116 291	Dawson v. Chicago, R. I. & P. R. Co., 52 C. C. A. 286, 114 Fed. 870 1364
D.	Dayton Coal & Iron Co. v. Cincinnati, N. O. & T. P. R. Co., 239 U. S. 446 449, 457, 466
D. E. Foote & Co. v. Stanley, 232 U. S. 494 17, 47	Dazy v. Apponaug Co., 36 R. I. 81 1107
Daley v. Boston & M. R. R., 166 N. Y. Supp. 840 855, 871, 874	Deal v. Coal & Coke Ry. Co., 215 Fed. 285 909
v. Illinois Cent. R. Co., 170 Ill. App. 185 1364	Deardorff v. Chicago, B. & Q. R. Co., 263 Mo. 65 268, 269, 767, 1299
Dalton v. South Eastern Ry. Co., 4 C. B. (N. S.) 303 1098	De Atley v. Chesapeake & O. Ry. Co., 201 Fed. 591 912, 924, 1148
Dalton Adding Machine Co. v. Commonwealth, 246 U. S. —, 62 L. Ed. —, 38 Sup. Ct. 361 18	Deavors v. Southern Exp. Co., — Ala. —, 76 So. 288 542
Daniel Ball, The v. United States, 10 Wall. (U. S.) 557 15, 21, 38, 272, 741, 746, 762	Debs, In re, 158 U. S. 564 15, 50, 51, 690
Daniels v. Savannah, F. & W. Ry. Co., 86 Ga. 236 1107	Dee v. San Pedro, L. A. & S. L. R. Co., — Utah —, 167 Pac. 246 1488
Darnell-Taenzler Lumber Co. v. Southern Pac. Co., 137 C. C. A. 460, 221 Fed. 890 502	Deffenbaugh v. Union P. R. Co., — Kan. —, 171 Pac. 647 846
Davenport v. Chesapeake & O. R. Co., 87 N. Y. Misc. 303 173, 547	Defiance Water Co. v. Defiance, 191 U. S. 184 1416
Davenport Co. v. Pennsylvania R. Co., 173 Pa. St. 398 293	Delano v. Roberts (Mo. App.), 182 S. W. 771 855, 956, 959, 1050, 1051
Davidson v. New Orleans, 96 U. S. 97 1237	v. United States, 136 C. C. A. 243, 220 Fed. 635 1447, 1462
Davis v. Chesapeake & O. R. Co., 166 Ky. 490 916, 980, 989, 1009	Delaware, L. & W. R. Co. v. Hughes, 153 C. C. A. 627, 240 Fed. 341 1093
v. Chicago, R. I. & P. R. Co., 134 Minn. 49 785, 790, 855, 860, 897, 1345	v. Interstate Commerce Com- mission, 166 Fed. 499 410
v. Cleveland, C. & St. L. R. Co., 217 U. S. 157 40	v. United States, 231 U. S. 363 176
v. Com., 236 U. S. 697 11	v. Van Santwood, 216 Fed. 252 83

[REFERENCES ARE TO PAGES]

- Delaware, etc., R. Co. v.  
   Yurkonis, 238 U. S. 439 703,  
     704, 777, 827, 828, 836, 851,  
       899, 1155  
   v. Yurkonis, 137 C. C. A. 23,  
     220 Fed. 429 828  
 Delaware & H. Co. v. Ketz, 147  
   C. C. A. 101, 233 Fed. 31  
     784, 942, 943, 944  
 Delevan v. Bates, 1 Mich. 97 1050  
 Delk v. St. Louis & S. F. R. Co.,  
   220 U. S. 580 843, 922, 1265,  
   1284, 1302, 1309, 1340, 1343,  
     1368, 1414  
 De Loach v. Southern R. Co.,  
   106 S. C. 155 173  
 De Lorme v. Atlantic Coast Line  
   R. Co., 79 S. C. 370 744  
 Demerce v. Minneapolis, St. P.  
   & S. S. M. R. Co., 122 Minn.  
   171 1343, 1405  
 Deni v. Pennsylvania R. Co.,  
   181 Pa. St. 525 1055  
 Denoyer v. Railway Transfer  
   Co. of Minneapolis, 121 Minn.  
   269 1196, 1197  
 Denver & I. R. Co. v. United  
   States, 150 C. C. A. 17, 236  
   Fed. 685 1435  
 Denver & R. G. R. Co. v.  
   Arrighi, 63 C. C. A. 649, 129  
   Fed. 347 1404, 1407  
   v. Baer Bros. Mercantile Co.,  
     109 C. C. A. 337, 187  
     Fed. 485 519  
   v. Da Vella, — Colo. —, 165  
     Pac. 254 821, 827  
   v. United States, 147 C. C.  
     A. 132, 233 Fed. 62  
     1447, 1450, 1471, 1478,  
     1481, 1482, 1485, 1486  
   v. Wilson, — Colo. —, 163  
     Pac. 857 722, 775, 821,  
     825, 832, 834, 1171, 1173,  
     1194, 1195, 1204, 1205, 1208  
 De Rivera v. Atchison, T. & S.  
   F. Ry. Co., — Tex. Civ. App.  
   —, 149 S. W. 223 1147, 1171,  
     1177  
 De Rochemont v. Boston & M.  
   R. Co., 171 N. Y. App. Div.  
   262 172  
 Detroit, T. & I. R. Co. v. State,  
   82 Ohio St. 60 744  
 De Valle Da Costa v. Southern  
   Pac. Co., 167 Fed. 654 1211  
 Devine v. Chicago, R. I. & P. R.  
   Co., 266 Ill. 248 703, 722, 737,  
     916, 1125, 1221
- Devine v. Chicago & C. River R.  
   Co., 259 Ill. 449 745, 761, 800,  
   1271, 1274, 1287, 1298, 1326,  
     1327, 1414  
 Dewberry v. Southern Ry. Co.,  
   175 Fed. 307 1171, 1173  
 De Winter & Co. v. Texas Cent.  
   R. Co., 150 N. Y. App. Div.  
   612 173  
 Diamond Glue Co. v. United  
   States Glue Co., 187 U. S. 611 13  
 Dickinson v. Industrial Board  
   of Illinois, 280 Ill. 342 910  
   v. Stiles, 246 U. S. —, 62 L.  
     Ed. —, 38 Sup. Ct. 415 734  
   v. West End St. Ry. Co.,  
     177 Mass. 365 939  
 Diebold v. Sharp, 19 Ind. App.  
   474 1095  
 Dionne v. American Exp. Co.,  
   — Vt. —, 101 Atl. 209 544  
 Dishon v. Cincinnati, N. O. &  
   T. P. Ry. Co., 126 Fed. 194 788  
 Dixon v. Central of Georgia Ry.  
   Co., 110 Ga. 173 582  
 Dodge v. Chicago Great West-  
   ern R. Co., 164 Iowa 627  
     959, 1326  
   v. Chicago, St. P., M. & O.  
     R. Co., 111 Minn. 123  
       172, 532, 541  
   v. Town of North Hudson,  
     188 Fed. 489 1142  
 Dodge & Dent Mfg. Co. v.  
   Pennsylvania R. Co., 175 N.  
   Y. App. Div. 823 172  
 Doichinoff v. Chicago, M. & St.  
   P. R. Co., 51 Mont. 582 1244  
 Donaldson v. Great Northern  
   R. Co., 89 Wash. 161 855,  
     926, 1238  
 Donegan v. Baltimore & N. Y.  
   R. Co., 91 C. C. A. 555, 165  
   Fed. 869 1307, 1326, 1359,  
     1361, 1407, 1410, 1414  
 Donoho v. Missouri Pac. R.  
   Co., 193 Mo. App. 610 172  
 Donovan v. Pennsylvania Co.,  
   199 U. S. 279 300, 340  
   v. Wells, Fargo & Co., 265  
     Mo. 291 81, 539, 543  
 Dooley v. Seaboard Air Line  
   R. Co., 163 N. C. 454 59,  
   1065, 1073, 1074, 1089, 1092,  
     1095, 1104, 1105, 1120  
   v. Smith, 13 Wall. (U. S.)  
   604 109

[REFERENCES ARE TO PAGES]

Dorr v. Chesapeake & O. Ry. Co., — W. Va., —, 88 S. E. 666 316	East Tennessee, V. & G. Ry. Co. v. Feathers, 10 Lea (Tenn.) 103 1347
Doty v. Chicago, St. P. & K. C. Ry. Co., 49 Minn. 499 1135	v. Interstate Commerce Commission, 181 U. S. 1 382, 383, 386, 651
Dow v. Beidelman, 125 U. S. 680 41, 69, 70, 72	v. Interstate Commerce Commission, 39 C. C. A. 413, 99 Fed. 52 319, 385
v. Portland Steam Packet Co., 84 Me. 490 595	Easter v. Virginian R. Co., 76 W. Va. 383 723, 737, 785, 807, 864, 884, 915, 943, 959, 994, 1032, 1147, 1181
Dowell v. Wabash Ry. Co. (Mo. App.), 190 S. W. 939 822, 824, 832, 1032, 1042, 1075	Eastern Ry. of New Mexico v. Ellis, — Tex. Civ. App., —, 153 S. W. 701 1171, 1173, 1176
Dozier v. State, 218 U. S. 124 12, 17, 21	Eau Claire Nat. Bank v. Jack- man, 204 U. S. 522 1163
Drake v. Nashville, C. & St. L. R. Co., 125 Tenn. 627 173, 576	Edwards v. Elliott, 21 Wall. (U. S.) 532 1237
Drey & Kahn Glass Co. v. Mis- souri Pac. R. Co., 156 Mo. App. 178 452	Elgin, J. & E. R. Co. v. United States, 93 C. C. A. 393, 168 Fed. 1 1287
Ducat v. Chicago, 10 Wall. (U. S.) 410 12	Elliott v. Atlantic Coast Line R. Co., 94 S. C. 129 547
Duggan v. Missouri Pac. R. Co., 96 Kan. 249 1030, 1032	v. Chicago, M. & St. P. R. Co., 35 S. D. 57 173, 598
Duluth-Superior Milling Co. v. Northern Pac. R. Co., 152 Wis. 528 277, 771	v. Illinois Cent. R. Co., 111 Miss. 426 703, 737, 822, 993
Dumphy v. Norfolk & W. R. Co., — W. Va., —, 95 S. E. 863 785	Ellis v. Interstate Commerce Commission, 237 U. S. 434 240, 258, 301, 679
Dungan v. St. Louis & S. F. R. Co., 178 Mo. App. 164 1173, 1174, 1209	Ellis's Adm'r v. Louisville, H. & St. L. R. Co., 155 Ky. 745 959, 960, 1032, 1041
Dunlap v. Chicago & A. R. Co., 187 Mo. App. 201 81, 543, 569	Ellsworth v. Metheney, 44 C. C. A. 484, 104 Fed. 119 784
Dunn v. Missouri Pac. Ry. Co., — Mo. App. —, 190 S. W. 966 836	Elmore v. Seaboard Air Line Ry. Co., 130 N. C. 506 1307
Duplan Silk Co. v. American & S. W. R. Co., 166 Mo. App. 372 452, 457	El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87 205, 693, 735, 753, 1155
Duplan Silk Co. v. American & Foreign Marine Ins. Co., 124 C. C. A. 18, 205 Fed. 724 456	Elwell v. Hicks, 180 Ill. App. 554 923, 1267
Duran v. Atchison, T. & S. F. R. Co., 100 Kan. 189 980, 989	Elwood Grain Co. v. St. Joseph & G. I. R. Co., 121 C. C. A. 153, 202 Fed. 845 442, 444, 456
Durre v. Western U. Tel. Co., 165 Wis. 190 247	Emanuel v. Georgia & F. R. Co., 142 Ga. 543 989
Durrett v. Chicago, R. I. & P. R. Co., 20 N. M. 114 1488	Emerson v. Portland, E. & E. R. Co., 85 Ore. 229 917
Dutton v. Atlantic Coast Line R. Co., 104 S. C. 16 862, 950, 1065 1106	Emert v. State, 156 U. S. 296 11
Duval v. Hunt, 34 Fla. 85 601	Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co., 135 Fed. 135 596
Duvall v. Louisiana Western R. Co., 135 La. 189 761	Employers' Liability Cases, 207 U. S. 463 40, 48, 49, 56, 690, 777
E.	
Easdale v. Atchison, T. & S. F. R. Co., 100 Kan. 305 761	

[REFERENCES ARE TO PAGES]

Enderstein v. Atchison, T. & S. F. R. Co., 21 N. M. 548	452
Eng v. Southern Pac. Co., 210 Fed. 92	841
Engemoen v. Chicago, St. P., M. & O. R. Co., 127 C. C. A. 426, 210 Fed. 896	456, 458
Engle v. O'Malley, 219 U. S. 128	14
Equity Elevator Co. v. Union Pac. R. Co., — Mo. App. —, 191 S. W. 1067	543
Erb v. Morasch, 117 U. S. 584	87
Erie R. Co. v. Jacobus, 137 C. C. A. 151, 221 Fed. 335	739, 773, 775
v. Krysienski, 151 C. C. A. 218, 238 Fed. 142	718, 750, 775, 799
v. New York, 233 U. S. 671	56, 99, 706, 946, 1280, 1432, 1433
v. People, 233 U. S. 671	45, 47
v. Purdy, 185 U. S. 148	1159, 1165
v. Purucker, 244 U. S. 320	1008, 1009, 1016
v. Russell, 106 C. C. A. 160, 183 Fed. 722	842, 1281, 1284, 1286, 1300, 1302, 1326, 1352, 1361
v. Steinberg, 94 Ohio St. 189	452
v. Stone, 244 U. S. 332	559, 569
v. United States, 153 C. C. A. 64, 240 Fed. 28	1386, 1392
v. United States, 118 C. C. A. 558, 200 Fed. 406	1490
v. United States, 116 C. C. A. 649, 197 Fed. 287	1265, 1332
v. Van Buskirk, 143 C. C. A. 71, 228 Fed. 489	704, 775, 799
v. Wanaque Lumber Co., 75 N. J. L. 878	442
v. Welsh, 242 U. S. 303	703, 775, 776, 781, 783, 877, 1154
v. Welsh, 89 Ohio St. 81	781, 1203, 1208, 1422
v. Williams, 233 U. S. 685	50, 56
v. Winfield, 244 U. S. 170	723, 727, 776, 791
Erismann v. Chicago, B. & Q. R. Co., — Iowa —, 163 N. W. 627	531, 542, 559, 595, 601, 608
Essex, Town of v. New England Tel. Co. of Massachusetts, 239 U. S. 313	42
Eubank v. City of Richmond, 226 U. S. 137	25
Eugene F. Moran, The v. New York Cent. & H. River Co., 212 U. S. 466	1347
Evanhoff v. State Industrial Accident Commission, 78 Ore. 503	822
Evans v. Detroit, G. H. & M. R. Co., 181 Mich. 413	844, 968
v. Fitchburg R. Co., 111 Mass. 142	575
Ewald v. Chicago & N. W. Ry. Co., 70 Wis. 420	785, 788, 939
Ewing v. City of Leavenworth, 226 U. S. 464	43, 267
v. Coal & Coke Ry. Co., — W. Va. —, 96 S. E. 73	801
Exposition Cotton Mills v. Western & A. R. Co., 83 Ga. 441	1211
Express Cases, 117 U. S. 1	258, 339
Eylenfeldt v. Illinois Steel Co., 165 Ill. 185	1211
F.	
Fairbank v. United States, 181 U. S. 283	10
Fairchild v. Dunbar Furnace Co., 128 Pa. St. 485	1211
v. Pennsylvania R. Co., 170 N. Y. App. Div. 135	705, 764, 858
Falyk v. Pennsylvania R. Co., 256 Pa. 397	799, 861, 990, 1017, 1031
Farley v. New York, N. H. & H. R. Co., 88 Conn. 409	1401
v. New York, N. H. & H. R. Co., 87 Conn. 328	1019, 1063, 1074, 1075, 1200, 1201
Farrell v. Pennsylvania R. Co., 87 N. J. L. 78	732, 1330, 1372
Faucher v. Wilson, 68 N. H. 338	576
Favor v. Boston & I. R. Corporation, 114 Mass. 350	1347
Feaster v. Philadelphia & R. Ry. Co., 197 Fed. 580	784
Felt v. Denver & R. G. R. Co., 48 Colo. 249	1271, 1287
Ferebee v. Norfolk Southern R. Co., 167 N. C. 290	1246
v. Norfolk Southern R. Co., 163 N. C. 351	964, 1246
Fernette v. Pere Marquette R. Co., 175 Mich. 653	705, 783, 843, 855, 1182, 1189



[REFERENCES ARE TO PAGES]

- Ferrari v. New York Cent. & H. River R. Co., 162 N. Y. App. Div. 6 173
- Ficklen v. Shelby County Taxing Dist., 145 U. S. 1 11
- Findley v. Coal & Coke Co., 76 W. Va. 747 745, 784, 843, 856, 1212, 1213
- Finn v. United States, 123 U. S. 227 1138
- First Employers' Liability Cases, 207 U. S. 463 691, 777
- First Nat. Bank of Richmond v. Turner, 154 Ind. 456 929, 1267
- Fish v. Chicago, R. I. & P. R. Co., 263 Mo. 106 732, 917, 942, 986, 1031, 1042, 1148, 1149
- Fisher v. Great Northern R. Co., 49 Wash. 205 458, 468
- Fitch, Cornell & Co. v. Atchison, T. & S. F. R. Co., 170 N. Y. App. Div. 222 172
- Fitchburg R. Co. v. Gage, 42 Gray (Mass.) 393 305
- Fithian v. St. Louis & S. F. Ry. Co., 188 Fed. 842 1171
- Fitzgerald v. Fitzgerald & Malory Const. Co., 41 Neb. 374 316, 499, 523
- v. Grand Trunk R. Co., 63 Vt. 169 317, 453, 468
- Fitzhenry v. Consolidated Traction Co., 63 N. J. L. 142 1211
- Flanders v. Georgia Southern & F. R. Co., 68 Fla. 479 722 725, 728, 1204
- Flas v. Illinois Cent. R. Co., 229 Fed. 319 1150
- Fleischman, Morris & Co. v. Southern Ry., 76 S. C. 237 594
- Fleming v. Norfolk Southern R. Co., 160 N. C. 196 734, 1051, 1203, 1208, 1422
- Fletcher v. Baltimore & P. R. Co., 168 U. S. 135 788, 789, 792
- v. South Dakota Cent. R. Co., 36 S. D. 401 922, 956, 959, 1032, 1039, 1040, 1049, 1075, 1307, 1405
- Florida East Coast R. Co. v. United States, 234 U. S. 167 69, 90
- Florman v. Dodd & Childs Exp. Co., 79 N. J. L. 63 530
- Fluker v. Georgia Railroad & Banking Co., 81 Ga. 461 339
- Fogarty v. Northern Pac. R. Co., 85 Wash. 90 1064, 1065, 1088, 1091
- Fogarty v. Northern Pac. R. Co., 74 Wash. 397 1032, 1064, 1082, 1088, 1119, 1129
- Foot & Co., D. E. v. Stanley, 232 U. S. 494 17, 47
- Ford v. Chicago, R. I. & P. R. Co., 123 Minn. 87 81, 172, 532, 543
- v. Williams, 21 How. (U. S.) 287 506
- Fordyce v. McCants, 51 Ark. 509 1094
- Fornel v. Florida East Coast R. Co., 65 Fla. 102 81, 171
- Ft. Smith & W. R. Co. v. Awbrey & Semple, 39 Okla. 270 81, 588
- v. Blevins, 35 Okla. 378 810
- v. Chandler Cotton Oil Co., 25 Okla. 82 206
- v. Holcombe, — Okla. —, 158 Pac. 633 732, 815, 919
- Ft. Worth Belt Ry. Co. v. Jones, — Tex. Civ. App. —, 182 S. W. 1184 1171
- v. Perryman, — Tex. Civ. App. —, 158 S. W. 1181 729, 739, 741, 1286
- Ft. Worth & D. C. Ry. Co. v. Copeland, — Tex. Civ. App. —, 164 S. W. 857 981
- v. Staleup, — Tex. Civ. App. —, 167 S. W. 279 855, 966, 1044, 1181, 1198
- Ft. Worth & R. G. Ry. Co. v. Bird, — Tex. Civ. App. —, 196 S. W. 597 723, 732, 1213
- Foster, Glassel Co. v. Kansas City Southern R. Co., 121 La. 1053 452, 457
- Foster Lumber Co. v. Atchison, T. & S. F. R. Co., 270 Mo. 629 452, 543
- Fourche River Lumber Co. v. Bryant Lumber Co., 230 U. S. 316 368, 439, 480
- Franklin v. South Eastern Ry. Co., 4 Hurl. & N. 511 1098
- Freeman v. Powell, — Tex. Civ. App. —, 144 S. W. 1033 894, 986, 1013
- Friday v. Santa Fe Cent. R. Co., 16 N. M. 434 758
- Fried v. New York, N. H. & H. R. Co., — N. Y. App. Div. —, 170 N. Y. Supp. 697 737
- Fritz v. Western U. Tel. Co., 25 Utah 263 1095

[REFERENCES ARE TO PAGES]

Frohlick Glass Co. v. Pennsylvania Co., 138 Mich. 116	575	Gamble-Robinson Commission Co. v. Union Pac. R. Co., 262 Ill. 400	81, 171, 542
Fry v. Southern Pac. Co., 247 Ill. 564	171, 532	Gardiner v. New York Cent. & H. River R. Co., 139 N. Y. App. Div. 17	574
Fulgham v. Midland Valley R. Co., 167 Fed. 660	713, 1176	Gardner v. Western U. Tel. Co., 145 C. C. A. 399, 231 Fed. 405	103, 247, 249
Fullerton, The, 92 C. C. A. 463, 167 Fed. 1	1416	Garrett v. Louisville & N. R. Co., 235 U. S. 308	1057, 1063, 1074, 1195, 1202, 1420
Funk v. St. Paul City Ry. Co., 61 Minn. 435	231	v. Louisville & N. R. Co., 117 C. C. A. 109, 197 Fed. 715	1071, 1087, 1102, 1196, 1201
G.		Gatton v. Chicago, R. I. & P. R. Co., 95 Iowa 112	316
Gaar, Scott & Co. v. Shannon, 223 U. S. 468	1155	Gee v. Lehigh Valley R. Co., 163 N. Y. App. Div. 274	723, 724, 917, 1031
Gaddy v. North Carolina R. Co., — N. C. —, 95 S. E. 925	982	Geer v. Mathieson Alkali Works, 190 U. S. 428	550
Gaines v. Detroit, G. H. & M. R. Co., 181 Mich. 376	745, 843, 916, 1182, 1184, 1205, 1212	v. St. Louis, S. F. & T. Ry. Co., — Tex. —, 194 S. W. 939	705, 723, 799, 855, 874, 877, 885, 892, 1053, 1054, 1205
v. Grand Trunk R. Co. of Canada, 193 Mich. 398	731, 914, 916, 988, 989, 1009, 1032, 1180	v. State, 161 U. S. 519	27, 743
Gainesville Midland Ry. v. Vandiver, 141 Ga. 350	1195	Gekas v. Oregon-Washington R. & Nav. Co., 75 Ore. 243	917
Gallagher v. New York Cent. R. Co., — N. Y. App. Div. —, 167 N. Y. Supp. 480	835	General Oil Co. v. Crain, 209 U. S. 211	70, 263
Galveston, H. & S. A. Ry. Co. v. Chojnacky, — Tex. Civ. App. —, 163 S. W. 1011	909	General Railway Signal Co. v. Com., 246 U. S. —, 62 L. Ed. —, 38 Sup. Ct. 360	18, 23
v. Crow (Tex. Civ. App.), 117 S. W. 170	532	George N. Pierce Co. v. Wells, Fargo & Co., 236 U. S. 278	567
v. F. A. Piper Co., 52 Tex. Civ. App. 568	532	Georgia, F. & A. R. Co. v. Blish Milling Co., 241 U. S. 190	170, 530, 539, 541, 559, 586, 588, 591, 598
v. J. H. Nations Meat & Supply Co., — Tex. Civ. App. —, 136 S. W. 833	744	Georgia R. R. v. Creety, 5 Ga. App. 424	451, 469
v. Kurtz, — Tex. Civ. App. —, 147 S. W. 658	1308, 1311, 1371, 1402	Georgia Southern & F. R. Co. v. Asmore, 88 Ga. 529	419
v. Sparks, — Tex. Civ. App. —, 162 S. W. 943	174, 544	Geraty v. Atlantic Coast Line R. Co., 211 Fed. 227	495
v. State, 210 U. S. 217	18, 38, 42	Gerber v. Wabash R. Co., 63 Mo. App. 145	452, 457
v. United States, 118 C. C. A. 339, 199 Fed. 891	1387, 1389, 1390, 1391, 1398	Gibbons v. Ogden, 9 Wheat. (U. S.) 1	5, 8, 15, 16, 31, 147
v. Wallace, 223 U. S. 481	81, 170, 263, 492, 529, 531, 533, 548, 573, 585, 592, 594	Gibson v. Bellingham & N. Ry. Co., 213 Fed. 488	734, 1197, 1238
v. Wallace (Tex. Civ. App.), 117 S. W. 169	532	Giersch v. Atchison, T. & S. F. R. Co., 98 Kan. 452	722, 873, 877, 1171, 1173, 1204, 1208
v. Wood-Hagenbarth Cattle Co., 105 Tex. 178	771	v. Atchison, T. & S. F. R. Co., — Kan. —, 171 Pac. 591	1143
Gamble-Robinson Commission Co. v. Chicago & N. W. R. Co., 94 C. C. A. 217, 168 Fed. 161	370, 451		

[REFERENCES ARE TO PAGES]

Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 94 987, 992, 994, 1024, 1026	Goodrich Transit Co. v. Interstate Commerce Commission 190 Fed. 943 218
Gilbert v. Burlington, C. R. & N. R. Co., 63 C. C. A. 27, 128 Fed. 529 1410	Gordon v. New Orleans Great Northern R. Co., 135 La. 137 718, 773, 775, 1310
Gilbert Bros. v. Chicago, R. I. & P. R. Co., 156 Iowa 440 575	Gorris v. Scott, L. R. 9 Ex. 125, 43 L. J. Ex. 92, 30 L. T. 431, 22 Wkly. Rep. 575 1347
Gilinsky v. Illinois Cent. R. Co., 98 Neb. 858 172	Graber v. Duluth, S. S. & A. R. Co., 159 Wis. 414 737, 776, 799, 864, 939, 981, 988, 1208
Gilleland & Dillingham v. Louisville & N. R. Co., 119 Ga. 789 1211	Grand Rapids & I. R. Co. v. United States, 129 C. C. A. 113, 212 Fed. 577 286, 353, 354, 355
Gillette v. Delaware, L. & W. R. Co., — N. J. Ch. —, 102 Atl. 673 1141	Grand Trunk R. Co. v. United States, 143 C. C. A. 392, 229 Fed. 116 1489, 1490
Gilliam v. Southern Ry. Co., — S. C. —, 93 S. E. 865 1066, 1087	Grand Trunk R. Co. of Canada v. Knapp, 147 C. C. A. 624, 233 Fed. 950 718, 721, 784, 814
Gillis v. New York, N. H. & H. R. Co., 224 Mass. 541 959	v. Michigan R. R. Commission, 231 U. S. 457 47, 69, 90, 91, 742
Gilman v. Eastern R. Corporation, 10 Allen (Mass.) 233 785	Grand Trunk Western Ry. Co. v. Lindsay, 233 U. S. 42 860, 922, 956, 959, 1009, 1031, 1041, 1048, 1195, 1198, 1323, 1401, 1405, 1420
v. Philadelphia, 3 Wall. (U. S.) 713 47	v. Lindsay, 120 C. C. A. 166, 201 Fed. 836 956, 1323
Gilmore v. Sapp, 100 Ill. 297 928, 1267	v. Poole, 175 Ind. 567 1307, 1310, 1326, 1327, 1358, 1407
Gimbel Bros., Inc. v. Barrett, 215 Fed. 1004 495	v. Thrift Trust Co., — Ind. App. —, 115 N. E. 685 722, 821, 832, 834, 1030, 1075, 1189, 1208, 1243
Giovio v. New York Cent. R. Co., 176 N. Y. App. Div. 230 776, 901	Granger v. Pennsylvania R. Co., 84 N. J. L. 338 804, 975
Gladson v. State, 166 U. S. 427 43, 87	Gray v. Chicago & N. W. R. Co., 153 Wis. 637 719, 788, 1208
Glassman v. Chicago, R. I. & P. R. Co., 166 Iowa 254 541	v. Louisville & N. R. Co., 197 Fed. 874 740, 1265, 1277, 1281, 1282, 1302
Glenlyon Dye Works v. Interstate Exp. Co., 36 R. I. 558 530, 541, 770	v. Southern R. Co., 167 N. C. 433 929, 932, 935
Glenn v. Cincinnati, N. O. & T. P. R. Co., 157 Ky. 453 980, 986, 1009, 1022	Great Lakes Coal & Dock Co. v. Seither Transit Co., 136 C. C. A. 110, 220 Fed. 28 460
Gloucester Ferry Co. v. State, 114 U. S. 196 9, 14, 15, 19, 51, 97, 216, 696	Great Northern R. Co. v. Capital Trust Co., 242 U. S. 144 776, 1063, 1064, 1066, 1068, 1072, 1154
Glover v. Savannah, F. & W. Ry. Co., 107 Ga. 34 1142	v. Donaldson, 246 U. S. 121 1010
Glunt v. Pennsylvania R. Co. 249 Pa. 522 810, 814, 827	v. King, 165 Wis. 159 706, 838
Godbout v. St. Paul Union Depot Co., 79 Minn. 188 340	v. Knapp, 240 U. S. 464 955, 980, 1154, 1160, 1169
Goen v. Baltimore & O. S. W. R. Co., 179 Ill. App. 566 1054	v. Loonan Lumber Co., 25 S. D. 155 467
Going's Adm'x v. Norfolk & W. R. Co., 119 Va. 543 734, 915, 917, 956, 1248	
Goldey v. Morning News, 156 U. S. 518 550	
Gollinger v. Pennsylvania R. Co., 237 Pa. 152 1147	

[REFERENCES ARE TO PAGES]

Great Northern R. Co. v. Mustell, 138 C. C. A. 305, 222 Fed. 879 784	Guana v. Southern Pac. Co., 15 Ariz. 413 988
v. O'Connor, 232 U. S. 508 170, 436, 454, 456, 558, 567	Gulf, C. & S. F. Ry. Co. v. Beezley, — Tex. Civ. App. —, 153 S. W. 651 1176
v. Otos, 239 U. S. 349 800, 843, 854, 885, 922, 1287, 1302, 1309, 1317, 1326, 1386, 1405	v. Cooper, — Tex. Civ. App. —, 191 S. W. 579 855, 915, 981, 990, 1007, 1010, 1031, 1043, 1075, 1171, 1402
v. State ex rel. State Rail- road & Warehouse Com- mission, 238 U. S. 340 69, 90, 300	v. Hall, — Tex. Civ. App. —, 196 S. W. 613 723, 990
v. United States, 157 C. C. A. 32, 244 Fed. 406 1334, 1338	v. Heffey, 158 U. S. 98 56, 79, 93, 284, 436, 451, 453
v. United States, 134 C. C. A. 98, 218 Fed. 302 1471, 1481, 1486	v. McGinnis, 228 U. S. 173 724, 1013, 1064, 1073, 1081, 1083, 1087, 1092, 1098, 1105, 1129, 1200, 1202, 1212
v. United States, 127 C. C. A. 595, 211 Fed. 309 1435, 1448, 1462	v. Mathis, — Tex. Civ. App. —, 194 S. W. 1135 745, 771
v. Wiles, 240 U. S. 444 138, 915, 933, 934, 950, 959, 986, 1041, 1154, 1345	v. Miami S. S. Co., 30 C. C. A. 142, 86 Fed. 407 177, 369, 370
Great Western R. Co. v. Sutton, L. R. 4 H. L. 226 311	v. Moore, 98 Tex. 302 499, 522
Green v. Chicago, B. & Q. R. Co., 205 U. S. 530 550	v. Nelson, 108 Tex. 305 544
Greenleaf-Johnson Lumber Co. v. Garrison, 237 U. S. 251 50, 227	v. State, 246 U. S. 58 86, 87
Greenwald v. New York Cent. & H. River R. Co., 95 N. Y. Misc. 122 452	v. State, 204 U. S. 403 274, 742, 768
Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co., 130 Iowa 123 596	v. State, 97 Tex. 274 745
Greenwood v. King, 82 Neb. 17 1095	v. State, — Tex. Civ. App. —, 169 S. W. 385 87
Grice v. Oregon-Washington R. & Nav. Co., 78 Ore. 17 173	v. Texas Packing Co., 244 U. S. 31 607
Grier v. Northern Assur. Co., 183 Pa. St. 334 1211	v. Vasbinder, — Tex. Civ. App. —, 172 S. W. 763 59
Grieve v. Illinois Cent. R. Co., 104 Iowa 659 575	Gulf & S. I. R. Co. v. Laurel Cotton Mills, 91 Miss. 166 442, 457
Griffith v. Midland Valley R. Co., — Kan. —, 166 Pac. 467 1201	Gulledge v. Seaboard Air Line R. Co., 147 N. C. 234 1142
v. Midland Valley R. Co., 100 Kan. 500 1057, 1063, 1075, 1087, 1088, 1153	Guy v. Baltimore, 100 U. S. 434 38
Grow v. Oregon Short Line R. Co., 47 Utah 26 706	v. Cincinnati Northern R. Co., — Mich. —, 166 N. W. 667 897
v. Oregon Short Line R. Co., 44 Utah 160 719, 773, 785, 786, 811	Gyger v. Philadelphia City Passenger Ry. Co., 136 Pa. St. 96 231
Grybowski v. Erie R. Co., 88 N. J. L. 1 703, 737, 773, 917, 974, 989, 993	

## H.

H. B. Williams, Inc. v. West- ern U. Tel. Co., 203 Fed. 140 247, 249
Haas v. Erie R. Co., 254 Pa. 235 917, 981
Hackett v. Chicago, I. & L. Ry. Co., 170 Ill. App. 140 1198
Hackney v. Missouri, K. & T. R. Co., 96 Kan. 30 956, 993

[REFERENCES ARE TO PAGES]

- Hadley v. Union Pac. R. Co., 99  
     Neb. 349 59, 732, 956, 1127,  
     1130, 1244  
 Haines v. Chicago, R. I. & P.  
     .. Ry., 193 Mo. App. 453 917, 942  
 Hale v. Henkel, 201 U. S. 43  
     679, 680  
     v. New Jersey Steam Nav.  
     Co., 15 Conn. 539 574  
 Hall v. De Cuir, 95 U. S. 485  
     15, 420  
     v. Florida East Coast R. Co.,  
     65 Fla. 111 81  
     v. Geiger-Jones Co., 242 U.  
     S. 539 20  
     v. Hall, 41 Wash. 186 929, 1267  
     v. Louisville & N. R. Co., 157  
     Fed. 464 1211, 1214  
     v. Southern R. Co., 149 N. C.  
     108 1142  
     v. Southern R. Co., 146 N. C.  
     345 1178  
     v. Vandalia R. Co., 169 Ill.  
     App. 12 892, 1118  
 Hamilton v. Chicago & A. R.  
     Co., 177 Mo. App. 145 172  
 Hamlen & Sons, J. H. v. Ill-  
     inois Cent. R. Co., 212 Fed.  
     324 171, 438, 467, 563, 570  
 Hamm Brewing Co., Theo. v.  
     Chicago, R. I. & P. Ry. Co.,  
     215 Fed. 672 34  
 Hammill v. Pennsylvania R. Co.,  
     87 N. J. L. 388 703, 729, 1107  
 Hammond Packing Co. v. State,  
     212 U. S. 322 680  
 Hampton v. St. Louis, I. M. &  
     S. R. Co., 227 U. S. 456 56  
 Handy v. Cleveland & M. R. Co.,  
     31 Fed. 689 142, 305  
 Haniggan v. Lehigh & H. River  
     Ry. Co., 157 N. Y. 244 1253  
 Hanley v. Kansas City Southern  
     Ry. Co., 187 U. S. 617 8, 33,  
     43, 247, 267, 766, 1284, 1299  
 Hanna v. Jeffersonville R. Co.,  
     32 Ind. 113 1142  
 Hannibal & St. J. R. Co. v.  
     Husen, 95 U. S. 465 9, 11,  
     19, 26, 38  
 Hansen v. New York Cent. &  
     H. River R. Co., — N. J. L.  
     —, 103 Atl. 200 786  
 Harbor Belt R. Co. v. United  
     States, 157 C. C. A. 293, 244  
     Fed. 943 1476  
 Hardaway v. Southern R. Co.,  
     90 S. C. 475 458, 461  
 Hardwick v. Wabash R. Co.,  
     181 Mo. App. 156 703, 732,  
     822, 823, 832, 834, 964, 1073,  
     1129, 1130, 1147, 1244  
 Hardwick Farmers' Elevator  
     Co. v. Chicago, R. I. & P. R.  
     Co., 110 Minn. 25 267, 767  
 Hardy v. Atlanta & W. P. R.  
     Co., — Ga. App. —, 93 S. E.  
     18 722, 775, 903, 976, 1171  
 Harman v. City of Chicago, 147  
     U. S. 396 762  
     v. Southern Ry. Co., 106 S.  
     C. 209 173  
 Harriman v. Interstate Com-  
     merce Commission, 211 U. S.  
     407 668, 679  
 Harrington v. Chicago, B. & Q.  
     R. Co. (Mo. App.), 180 S.  
     W. 443 898  
 Harris v. Northern Indiana R.  
     Co., 20 N. Y. 232 575  
 Harrisburg, The, 119 U. S. 199  
     1138, 1210  
 Harrison v. Hughes, 60 C. C.  
     A. 442, 125 Fed. 860 1473  
 Harrison Granite Co. v. Grand  
     Trunk R. R. System, 175  
     Mich. 144 172, 547  
 Hart v. Chicago & N. W. R.  
     Co., 69 Iowa 485 575  
     v. Pennsylvania R. Co., 112  
     U. S. 331 536, 537, 558, 576  
 Hartley v. St. Louis, K. & N.  
     W. R. Co., 115 Iowa 612 538  
 Hartman v. Chicago, B. & Q. R.  
     Co., 192 Mo. App. 271 1132, 1196  
     v. Western Maryland R. Co.,  
     246 Pa. 460 917, 981  
 Harvey v. Texas & P. R. Co.,  
     92 C. C. A. 237, 166 Fed.  
     385 784, 788  
 Haseltine v. Central Nat.  
     Bank, 155 Mo. 66 59, 929, 1267  
 Haskell v. St. Louis & S. F. R.  
     Co., — Okla. —, 162 Pac. 459  
     531, 543  
 Haskell Implement & Seed Co.  
     v. Postal Tel. Cable Co.,  
     114 Me. 277 246, 247  
 Hawkins v. St. Louis & S. F.  
     R. Co., 189 Mo. App. 201  
     731, 918, 931  
 Hayes v. Michigan Cent. R.  
     Co., 111 U. S. 228 945  
 Hays & Co., John v. Penn-  
     sylvania Co., 12 Fed. 309 306

[REFERENCES ARE TO PAGES]

Hearst v. St. Louis, I. M. & S. R. Co., 188 Mo. App. 36	764, 855, 856, 1171
Hedding v. Gallagher, 72 N. H.	377 340
Heilman & Clark v. Chicago & N. W. R. Co., 167 Iowa	313 171, 542
Heimbach v. Lehigh Valley R. Co., 197 Fed.	579 848
Hein v. Great Northern R. Co., 34 N. D.	440 723, 725, 764, 833, 855, 858, 1171, 1173, 1196, 1205
Heller v. Chicago & G. T. Ry. Co., 109 Mich.	53 575
Helm v. Cincinnati, N. O. & T. P. R. Co., 156 Ky.	240 919, 929, 944, 981, 1020
Hemingway v. Illinois Cent. R. Co., 52 C. C. A.	477, 114 Fed. 843 735, 1051
Hench v. Pennsylvania R. Co., 246 Pa.	1 705, 784, 807, 1226
Henderson v. Union Pac. R. Co., 100 Neb.	734 855, 981
v. Wickham, 92 U. S.	259 14
Henderson Bridge Co. v. Com., 166 U. S.	150 9
Henderson & Walters v. Atlantic Coast Line Ry. Co., — Ala. —, 76 So.	309 542
Hendrick v. State, 235 U. S.	610 16
Hennington v. State, 163 U. S.	299 40, 45, 83, 98, 743
Henry v. Chicago, M. & P. S. R. Co., 84 Wash.	633 174
Hepner v. United States, 213 U. S.	103 1426
Herlihy v. New York, N. H. & H. R. Co., 227 Mass.	168 916
Herminghausen v. Adams Exp. Co., 167 Iowa	230 461, 467
Herndon v. Chicago, R. I. & P. R. Co., 218 U. S.	135 38, 43, 87
Herndon-Carter Co. v. James N. Norris, Son & Co., 224 U. S.	496 550
Herring v. Atlantic Coast Line R. Co., 168 N. C.	555 1132
v. Atlantic Coast Line R. Co., 160 N. C.	252 81, 531
Hewett v. Chicago, B. & Q. Ry. Co., 63 Iowa	611 596
Heyman v. Hays, 236 U. S.	178 17
Heymann v. Southern R. Co., 203 U. S.	270 17, 21, 24
Higbee v. Western U. Tel. Co., 179 Mo. App.	195 250
Higgins v. Erie R. Co., 89 N. J. L.	629 739, 757, 907
Hightower v. Southern R. Co., 146 Ga.	279 988, 989
Hillebrand v. Standard Bis- cuit Co., 139 Cal.	233 1094
Hinson v. Atlanta & C. Air Line R. Co., 172 N. C.	646 718, 914, 959, 989
Hipolite Egg Co. v. United States, 220 U. S.	45 10, 14, 15, 50, 690
Hoadley Brake Shoe Co. v. American Brake Shoe & Foundry Co., 141 C. C. A.	638, 227 Fed. 90 301
Hoag v. Ulster & D. R. Co., 177 N. Y. App. Div.	433 705, 776, 858, 860
Hobbs v. Great Northern R. Co., 80 Wash.	678 788, 917, 937
Hoher v. New York & P. R. Co., 220 N. Y.	613 855
Hocking Valley R. Co. v. Lack- awanna Coal & Lumber Co., 140 C. C. A.	408, 224 Fed. 930 457
v. New York Coal Co., 132 C. C. A.	387, 217 Fed. 727 285
v. United States, 127 C. C. A.	285, 210 Fed. 735 370, 451
Hodnett v. Boston & A. R. Co., 156 Mass.	86 1107
Hoffman v. Cumberland Valley R. Co., 85 Md.	391 538
Hogan v. New York Cent. & H. River R. Co., 139 C. C. A.	328, 223 Fed. 890 860, 1065, 1146, 1240
Hogan Milling Co. v. Union Pac. R. Co., 91 Kan.	783 592
Hogarty v. Philadelphia & R. R. Co., 255 Pa.	236 705, 723 1196, 1204, 1205, 1213
v. Philadelphia & R. R. Co., 245 Pa.	443 718, 725, 732, 773, 1132, 1181, 1190, 1196
Hohenleitner v. Southern Pac. Co., 177 Fed.	796 834, 1265, 1281, 1286, 1343, 1345
Hoke v. United States, 227 U. S.	308 14, 50, 690
Holliday v. Jackson, 21 Mo. App.	660 1211

[REFERENCES ARE TO PAGES]

- Hollingshead v. Detroit, G. H. & M. R. Co., 181 Mich. 547 916
- Holmberg v. Lake Shore & M. S. R. Co., 188 Mich. 605 731, 822, 833, 855, 956, 1147
- Holmes v. Pennsylvania R. Co., 220 Pa. 189 1095
- v. Trout, 7 Pet. (U. S.) 171 1210
- Holsapple v. Rome, W. & O. R. Co., 86 N. Y. 275 574
- Holtzclaw v. Chicago, B. & Q. R. Co., — Mo. App. —, 190 S. W. 91 917
- Hooker v. Boston & M. R. R., 209 Mass. 598 445
- Hooks v. New Orleans & N. E. R. Co., 111 Miss. 743 843, 916, 942
- Hooper v. State, 155 U. S. 648 10, 12
- Hoover v. Beech Creek R. Co., 154 Pa. St. 362 327
- v. Pennsylvania R. Co., 156 Pa. St. 220 305
- Hoover's Adm'x v. Chesapeake & O. Ry. Co., 46 W. Va. 268 1142
- Hopkins v. United States, 171 U. S. 578 9, 10
- Hopper v. Denver & R. G. R. Co., 84 C. C. A. 21, 155 Fed. 273 1095, 1098
- Horton Case, 233 U. S. 492 982
- Horton v. Oregon-Washington R. & Nav. Co., 72 Wash. 503 732, 785, 899
- v. Seaboard Air Line R. Co., — N. C. —, 95 S. E. 883 1084, 1091
- v. Seaboard Air Line R. Co., 169 N. C. 108 734, 1031
- v. Seaboard Air Line R. Co., 157 N. C. 146 783, 1040
- Hough v. Texas & P. R. Co., 100 U. S. 213 735, 992, 1050
- House v. Chicago & N. W. R. Co., 30 S. D. 321 544, 548
- Houseman v. Fargo, 124 N. Y. Supp. 1086 440, 458
- Houston Direct Nav. Co. v. Insurance Co. of North America, 89 Tex. 1 762
- Houston, E. & W. T. R. Co. v. Inman, Akers & Inman, 63 Tex. Civ. App. 556 563, 570
- v. Samford, — Tex. Civ. App. —, 181 S. W. 857 822, 917
- Houston, etc., R. Co. v. United States, 234 U. S. 342 15, 40, 54, 69, 73, 285, 376, 689
- Houston & T. C. R. Co. v. Bright, — Tex. Civ. App. —, 156 S. W. 304 705
- v. Cowser, 57 Tex. 293 1095
- v. Lewis, 103 Tex. 452 174
- v. Mayes, 201 U. S. 321 43, 743
- Hovaneck v. Great Northern R. Co., 165 Wis. 511 981, 1010, 1402
- Howard v. Chicago, R. I. & P. Ry. Co., — Mo. App. —, 184 S. W. 906 268, 564, 767
- v. Illinois Cent. R. Co., 207 U. S. 463 206, 742
- v. Nashville, C. & St. L. R. Co., 133 Tenn. 19 723, 1176
- Howard & Callahan v. Illinois Cent. R. Co., 161 Ky. 783 770
- Howard Supply Co. v. Chesapeake & O. Ry. Co., 162 Fed. 188 463
- Howell v. Atlantic Coast Line R. Co., 99 S. C. 417 734, 799, 950, 1194
- Hoxie v. New York, N. H. & H. R. Co., 82 Conn. 352 714, 1147
- Hubert v. New York, N. H. & H. R. Co., 90 Conn. 261 703, 854, 857, 1030, 1194, 1228
- Hudkins v. Bush, 69 W. Va. 194 756
- Hudson v. Chicago, St. P., M. & O. Ry. Co., 226 Fed. 38 81, 171
- Hudson & M. R. Co. v. Iorio, 152 C. C. A. 641, 239 Fed. 855 703, 775, 798, 799, 829
- Hughes v. Delaware, L. & W. R. Co., 233 Fed. 118 915
- v. New York, O. & W. R. Co., 158 N. Y. App. Div. 443 1213
- Hulac v. Chicago & N. W. Ry. Co., 194 Fed. 747 708, 1148
- Hulett v. St. Louis, K. C. & N. Ry. Co., 67 Mo. 239 1253
- Hull v. Virginian R. Co., 78 W. Va. 25 917, 919, 926, 943, 956, 959, 981, 988, 990, 1010, 1402
- Hunt v. Chicago, B. & Q. R. Co., — Iowa —, 165 N. W. 105 953
- Hunter v. St. Louis & S. F. R. Co., 167 Mo. App. 624 437
- Hurley v. Illinois Cent. R. Co., 133 Minn. 101 718, 773, 775, 800, 807, 874, 916, 922, 926, 943, 1271, 1307, 1310, 1361

[REFERENCES ARE TO PAGES]

Hurst v. Chicago, R. I. & P. R.  
Co., 49 Iowa 76 939  
v. Detroit City Ry. Co., 84  
Mich. 539 1111, 1211  
Hurtado v. People, 110 U. S.  
516 1237  
Huse v. Glover, 119 U. S. 543 97  
Huxoll v. Union Pac. R. Co.,  
99 Neb. 170 785, 1010, 1031

## I.

Illinois Cent. R. Co. v. Archer,  
113 Miss. 158 705  
v. Barron, 5 Wall. (U. S.)  
90 1111  
v. Behrens, 233 U. S. 473  
690, 775, 777, 780, 782,  
806, 858, 868, 873, 880  
v. Campbell, 170 Ill. 163 1211  
v. Com., 218 U. S. 551 1155  
v. Cousins, 241 U. S. 641  
777, 782, 835, 836, 837, 909  
v. De Fuentes, 236 U. S. 157  
48, 264, 747, 761, 762  
v. Doherty's Adm'r, 153 Ky.  
363 722, 1057, 1064,  
1065, 1082, 1091, 1103,  
1200, 1201  
v. Fleming, 148 Ky. 473 316  
v. Henderson Elevator Co.,  
226 U. S. 441 436, 450,  
460, 467, 470, 477  
v. Henderson Elevator Co.,  
138 Ky. 220 477  
v. Holman, 106 Miss. 449 440  
v. Kelly, 167 Ky. 745 775,  
829, 1184, 1204  
v. Louisiana R. R. Commis-  
sion, 236 U. S. 157 75, 264  
v. McKendree, 203 U. S.  
514 48, 49  
v. Mahon Live Stock Co.,  
111 Miss. 496 599  
v. Matthews, 24 Ky. L.  
Rep. 1766 290  
v. Mulberry Hill Coal Co.,  
238 U. S. 275 44,  
342, 343, 463, 492, 501, 635  
v. Nelson, 128 C. C. A. 525,  
212 Fed. 69 1190, 1208, 1422  
v. Nelson, 122 C. C. A. 258,  
203 Fed. 956 895  
v. Peery, 242 U. S. 292  
807, 857, 866  
v. People, 108 U. S. 541 70  
v. Porter, 125 C. C. A. 55,  
207 Fed. 311 737, 895,  
901, 1039, 1063, 1202

Illinois Cent. R. Co. v. Public  
Utilities Commission, 245 U. S.  
493 54, 69, 378  
v. Rogers, 136 C. C. A. 530,  
221 Fed. 52 705, 718,  
974, 1146, 1180  
v. S. Segari & Co., 205 Fed.  
998 439, 451  
v. Skaggs, 240 U. S. 66  
734, 854, 915, 957, 959,  
1039, 1042, 1047, 1155  
v. State, 163 U. S. 142 43, 87  
v. Stewart, 138 C. C. A.  
444, 223 Fed. 30 1053,  
1063, 1200, 1201, 1205  
v. United States, 154 C. C.  
A. 425, 241 Fed. 667  
1462, 1469  
v. W. L. Hoopes & Sons, 233  
Fed. 135 475  
v. Williams, 242 U. S. 462  
776, 1266, 1307, 1340,  
1365, 1373, 1375  
Indianapolis & G. Rapid Trans-  
it Co. v. Foreman, 162 Ind.  
85 1018  
Ingle v. Southern R. Co., 167  
N. C. 636 764, 1205, 1208  
Inland & S. C. Co. v. Tolson,  
139 U. S. 551 735  
International Paper Co. v.  
Commonwealth, 245 U. S.  
—, 62 L. Ed. —, 38 Sup. Ct.  
292 18  
International R. Co. v. United  
States, 151 C. C. A. 333, 238  
Fed. 317 1266, 1357, 1386  
International Text Book Co. v.  
Pigg, 217 U. S. 91 8, 10, 11  
International Watch Co. v.  
Delaware, L. & W. R. Co.,  
80 N. J. L. 553 529, 583  
International & G. N. R. Co. v.  
Pape, 73 Tex. 501 1211  
Interstate Commerce Commis-  
sion v. Alabama Midland R.  
Co., 168 U. S. 144 156, 312,  
318, 380, 382, 651  
v. Atchison, T. & S. F. R.  
Co., 234 U. S. 294 442,  
654, 762, 886  
v. Baird, 194 U. S. 25 666, 679  
v. Baltimore & O. R. Co.,  
225 U. S. 326 312, 349, 359  
v. Baltimore & O. R. Co.,  
145 U. S. 263 141, 154,  
304, 306, 307, 309, 311,  
326, 327, 383, 418, 423, 628



[REFERENCES ARE TO PAGES]

Interstate Commerce Commission v. Baltimore & O. R. Co., 43 Fed. 37 154, 156, 308, 326, 419, 423	Interstate Commerce Commission v. Louisville & N. R. Co., 73 Fed. 409 156, 628
v. Bellaire, Z. & C. Ry. Co., 77 Fed. 942 207, 1294	v. Northern Pac. R. Co., 216 U. S. 538 656
v. Brimson, 154 U. S. 447 15, 50, 148, 285, 628, 743	v. Southern Pac. Co., 123 Fed. 597 337
v. Chicago, B. & Q. R. Co., 218 U. S. 113 381	v. Stickney, 215 U. S. 98 235, 237, 367, 442, 654, 763
v. Chicago, B. & Q. R. Co., 186 U. S. 320 235, 237, 283, 442, 763	v. Union Pac. R. Co., 222 U. S. 541 450, 463
v. Chicago Great Western Ry. Co., 209 U. S. 108 156, 326, 327, 383, 405, 406	v. United States ex rel. Humboldt S. S. Co., 224 U. S. 474 206, 437
v. Chicago Great Western Ry. Co., 141 Fed. 1003 308, 326	v. Western New York & P. R. Co., 82 Fed. 192 260
v. Chicago, R. I. & P. R. Co., 218 U. S. 88 154, 381, 450, 463	Interstate Stock-Yards Co. v. Indianapolis Union Ry. Co., 99 Fed. 472 207, 218
v. Chicago & A. R. Co., 215 U. S. 479 493, 635	Iowa Cent. Ry. Co. v. State, 160 U. S. 389 518
v. Cincinnati, N. O. & T. P. Ry. Co., 167 U. S. 479 72, 142, 145, 154, 157, 166, 177, 634, 679	Ireland v. Woods, 246 U. S. —, 62 L. Ed. —, 38 Sup. Ct. 319 18
v. Cincinnati, N. O. & T. P. Ry. Co., 76 Fed. 183 628	Irvin v. Southern R. Co., 164 N. C. 5 1102, 1120, 1220
v. Cincinnati, N. O. & T. P. Ry. Co., 64 Fed. 981 628	Ivey v. Louisville & N. R. Co., 18 Ga. App. 434 914, 946, 1032, 1042
v. Cincinnati, P. & V. R. Co., 124 Fed. 624 383	J.
v. Clyde S. S. Co., 181 U. S. 29 380, 382	J. H. Hamlen & Sons v. Illinois Cent. R. Co., 212 Fed. 324 171, 438, 563, 570
v. Delaware, L. & W. R. Co., 220 U. S. 235 312, 410, 454	Jackson v. Chicago, M. & St. P. Ry. Co., 210 Fed. 495 811
v. Delaware, L. & W. R. Co., 216 U. S. 531 174, 179	v. Industrial Board of Ill- inois, 280 Ill. 526 851, 1241
v. Detroit, G. H. & M. Ry. Co., 167 U. S. 633 15, 284, 294, 326, 383, 442	v. Missouri Pac. Ry. Co., 104 Mo. 448 1253
v. Dittenbaugh, 222 U. S. 42 363, 365, 367, 378, 383, 443, 654	Jackson Architectural Iron Works v. Hurlbut, 158 N. Y. 34 741
v. East Tennessee, V. & G. Ry. Co., 85 Fed. 107 155	Jacobs v. Southern R. Co., 241 U. S. 229 721, 762, 884, 980, 983, 987, 988
v. Goodrich Transit Co., 224 U. S. 194 186, 211, 212, 213, 662, 679	v. Western U. Tel. Co., 196 Mo. App. 300 246, 247, 249
v. Illinois Cent. R. Co., 215 U. S. 452 284, 342, 343, 635	Jacobson v. Wisconsin, M. & P. R. Co., 71 Minn. 519 91
v. Louisville & N. R. Co., 227 U. S. 88 91, 450, 679	Jacoby v. Chicago, M. & St. P. R. Co., 165 Wis. 610 704, 719, 776, 792
v. Louisville & N. R. Co., 190 U. S. 273 651	James v. Bowman, 190 U. S. 127 48
v. Louisville & N. R. Co., 118 Fed. 613 387, 628	Jarrett v. High Point Trunk & Bag Co., 144 N. C. 299 1245
	Jenkins v. Collard, 145 U. S. 546 1422
	Jennings v. Grand Trunk Ry. Co., 52 Hun (N. Y.) 227 576

[REFERENCES ARE TO PAGES]

Jewel Tea Co. v. Lees Summit, Missouri, 198 Fed. 532	761	Jones v. Louisville & N. R. Co., — Mo. App. —, 182 S. W. 1064	530
Jewett Bros. & Jewett v. Chicago, M. & St. P. Ry. Co., 156 Fed. 160	640	v. Newport News & M. V. Co., 13 C. C. A. 95, 65 Fed. 736	174
John Hays & Co. v. Pennsylvania Co., 12 Fed. 309 142, 306, 328		v. Southern Exp. Co., 104 Miss. 126	172
Johnson v. Alabama & V. Ry. Co., 69 Miss. 191	575	v. Southern Ry. in Ken- tucky, 175 Ky. 455 822, 980, 989, 1009, 1401	
v. American Smelting & Re- fining Co., 80 Neb. 255 1211		Jordan v. Southern R. Co., 100 S. C. 284	456
v. Chicago & P. Elevator Co., 119 U. S. 388	40	Jordan Bros. v. Chicago, B. & Q. R. Co., — Mo. App. —, 196 S. W. 417	543
v. Great Northern R. Co., 102 C. C. A. 89, 178 Fed. 643 888, 1049, 1281, 1286, 1325, 1347, 1352, 1401, 1405, 1407, 1414		Jorgenson v. Grand Rapids & I. R. Co., 189 Mich. 537 731, 1070, 1180, 1195	
v. Missouri Pac. Ry. Co., — Mo. App. —. 187 S. W. 282	559	Joseph v. Chicago, B. & Q. R. Co., 175 Mo. App. 18	172, 547, 569
v. New York, N. H. & H. R. Co., 111 Me. 263	457	Judd's Adm'x v. Southern R. Co., 171 Ky. 832	942, 980
v. Pensacola & P. R. Co., 16 Fla. 623	305	<b>K.</b>	
v. Southern Pac. Co., 196 U. S. 1 51, 690, 842, 847, 1266, 1267, 1281, 1284, 1302, 1303, 1340, 1351, 1352, 1353, 1358		Kain v. Arizona Copper Co., 14 Ariz. 566	1211
v. Southern Pac. Co., 54 C. C. A. 508, 117 Fed. 462 1253, 1259, 1350		Kambris v. Oregon-Washing- ton R. & Nav. Co., 75 Ore. 358 718, 723, 724, 899, 1081, 1147, 1181, 1200, 1205	
v. Toledo, S. & M. R. Co., 133 Mich. 596	293	Kanawha & M. R. Co. v. Kerse, 239 U. S. 576 740, 761, 777, 854, 987, 1016, 1155, 1160, 1180, 1243	
Johnson-Brown Co. v. Delaware, L. & W. R. Co., 239 Fed. 590	439	Kansas City, City of v. Hart, 60 Kan. 684	1211
Johnson Grain Co. v. Chicago, B. & Q. R. Co., 177 Mo. App. 194 172, 543, 559		Kansas City Breweries Co. v. Kansas City, 96 Kan. 731	33
Johnston v. Chicago Great west- ern R. Co. (Mo. App.), 164 S. W. 260 1271, 1288, 1304, 1344, 1410, 1414, 1415		Kansas City, C. & S. R. Co. v. Shoemaker, 157 C. C. A. 413, 245 Fed. 117	915
Jones v. Charleston & W. C. R. Co., 98 S. C. 197 723, 1102		Kansas City, Ft. S. & M. R. Co. v. Botkin, 240 U. S. 227	18
v. Chesapeake & O. R. Co., 149 Ky. 566 705, 822, 823, 1184		v. McGahey, 63 Ark. 344	290
v. Kansas City Southern R. Co., — La. —, 78 So. 568	1077	v. Secretary of Kansas, 240 U. S. 227	42
v. Kansas City Southern R. Co., 137 La. 178 1030, 1052, 1064		Kansas City, M. & B. R. Co. v. Flippo, 138 Ala. 487 1265, 1407	18
v. Lehigh & N. E. R. Co., 202 Pa. 81	537	v. Stiles, 242 U. S. 111	18
		Kansas City, M. & O. Ry. Co. v. Roe, 50 Okla. 105 1064, 1065, 1074, 1089	
		Kansas City, M. & O. Ry. Co. of Texas v. Corn, — Tex. Civ. App. —, 186 S. W. 807	173

[REFERENCES ARE TO PAGES]

Kansas City, etc., Ry. Co. of Texas v. Finke, — Tex. Civ. App. —, 190 S. W. 1143 981, 990, 1031	Keels v. Atlantic Coast Line R. Co., 104 S. C. 497 1132
v. Pope, — Tex. Civ. App. —, 152 S. W. 185 764, 867, 874, 884	Keithley v. Lusk, 190 Mo. App. 458 529, 583, 584
Kansas City, O. B. & E. R. Co. v. Board of Railroad Com'rs, 73 Kan. 168 231	Kelley v. Great Northern Ry. Co., 152 Fed. 211 708, 1031, 1265
Kansas City, P. & G. R. Co. v. State, 65 Ark. 363 290	Kells Mill & Lumber Co. v. Pennsylvania R. Co., 89 N. J. L. 490 452
Kansas City Southern R. Co. v. Armstrong, 115 Ark. 123 1135	Kelly v. Pennsylvania R. Co., 151 C. C. A. 171, 238 Fed. 95 775, 836
v. Brooks, 84 Ark. 233 278	v. Rhoads, 188 U. S. 1 42
v. C. H. Albers Commission Co., 223 U. S. 573 437, 440, 451, 457, 476, 481, 492, 1155, 1161	Kelly's Adm'x v. Chesapeake & O. Ry. Co., 201 Fed. 602 1148, 1177, 1420
v. Carl, 227 U. S. 639 56, 81, 170, 249, 436, 439, 440, 451, 456, 460, 470, 529, 542, 559, 576, 586, 608	Kellyville Coal Co. v. Petray- tis, 195 Ill. 215 1055
v. Cook, 100 Ark. 467 763, 946, 1149, 1180, 1197, 1302	Kemper Mill Co. v. Missouri Pac. R. Co., 193 Mo. App. 466 591
v. Jones, 241 U. S. 181 854, 1030, 1052, 1154, 1162	Kennard v. Louisiana ex rel. Morgan, 92 U. S. 480 1237
v. Kaw Valley Drainage Dist., 233 U. S. 75 227	Kennerson v. Thames Tow- boat Co., 89 Conn. 367 739
v. Leslie, 238 U. S. 599 733, 1064, 1074, 1083, 1092, 1129, 1146, 1148	Kenney v. Seaboard Air Line R. Co., 167 N. C. 14 1060
v. Leslie, 112 Ark. 305 734, 1219	v. Seaboard Air Line R. Co., 165 N. C. 99 1064
v. Livesay, 118 Ark. 304 854, 918, 919, 980, 989	Kennon v. Gilmer, 131 U. S. 22 1245
v. Miller, 117 Ark. 396 860, 863, 1149	Kent v. Chicago, B. & Q. R. Co., 189 Mo. App. 424 529
v. Mixon-McClintock Co., 107 Ark. 48 171, 594	Kentucky & I. Bridge Co. v. Louisville & N. R. Co., 37 Fed. 567 155, 177, 214, 226, 227, 311, 630
v. United States, 231 U. S. 423 186, 662	Kentucky & T. R. Co. v. Minton, 167 Ky. 516 916, 959
Kansas City Western R. Co. v. McAdow, 240 U. S. 51 733, 752, 1155, 1162, 1167, 1195, 1197, 1245	Kenyon v. Illinois Cent. R. Co., 173 Iowa 484 854, 1017, 1030
Kansas City & M. R. Co. v. New York Cent. & H. River R. Co., 110 Ark. 612 552	Keokuk Northern Line Packet Co. v. City of Keokuk, Iowa, 95 U. S. 80 45, 743
v. Oakley, 115 Ark. 20 81, 171, 542	Kidd v. Pearson, 128 U. S. 1 9, 13, 45
Kansas Pac. Ry. Co. v. Bayles, 19 Colo. 348 327	Kiff v. Old Colony & N. R. Co., 117 Mass. 591 575
Karem v. United States, 57 C. C. A. 486, 121 Fed. 250 48	Killes v. Great Northern R. Co., 93 Wash. 416 706, 838, 1147
Karr v. Baltimore & O. R. Co., 76 W. Va. 526 174, 588, 595	Killmer v. New York Cent. & H. River R. Co., 100 N. Y. 395 304, 305
Karras v. Chicago & N. W. R. Co., 165 Wis. 578 776, 822, 832	Kinnavey v. Terminal R. Ass'n of St. Louis, 81 Fed. 802 154, 310
Kates v. Atlanta Baggage & Cab Co., 107 Ga. 636 339	Kinney v. Hudson River R. Co., 98 N. Y. Misc. 11 1218
	Kinsley v. Buffalo, N. Y. & P. R. Co., 37 Fed. 181 305, 328, 426

[REFERENCES ARE TO PAGES]

Kinzell v. Chicago, M. & St. P. Ry. Co., — Idaho —, 171  
 Pac. 1136 819  
 Kippenbrock v. Wabash R. Co., 270 Mo. 479 1030, 1045, 1047  
 Kipros v. Uintah R. Co., 45  
 Utah 389 855, 1055, 1065, 1075, 1088  
 Kirbo v. Southern R. Co., 16  
 Ga. App. 49 980, 989, 1009, 1401  
 Kirby v. Union Pac. R. Co., 94  
 Kan. 485 270  
 Kirmeyer v. State, 236 U. S. 568 16, 21, 22  
 Kirsch v. Postal Tel. Cable Co., 100 Kan. 250 248  
 Kiser v. Metropolitan St. Ry. Co., 188 Mo. App. 169 857  
 Kiser Co., M. C. v. Central of Georgia Ry. Co., 152 C. C. A. 552, 239 Fed. 718 640  
 v. Central of Georgia Ry. Co., 236 Fed. 573 450, 640  
 v. Central of Georgia Ry. Co., 158 Fed. 193 640  
 Kizer v. Texarkana & Ft. S. Ry. Co., 66 Ark. 348 457  
 Knapp v. Great Northern R. Co., 130 Minn. 405 985, 1040  
 v. Lake Shore & M. S. R. Co., 197 U. S. 536 185, 186  
 v. Minneapolis, St. P. & S. M. R. Co., 34 N. D. 466 173, 452, 543, 600  
 v. Minneapolis, St. P. & S. M. R. Co., 33 N. D. 291 348  
 Knieriem v. New York Cent. & H. River R. Co., 109 N. Y. App. Div. 709 291  
 Knight v. United States Land Ass'n, 142 U. S. 161 1422  
 Knott v. Chicago, B. & Q. R. Co., 230 U. S. 474 69, 73  
 Knowles v. New York, N. H. & H. R. Co., 177 N. Y. App. Div. 262 703, 705, 776, 777, 791  
 v. New York, N. H. & H. R. Co., 164 N. Y. App. Div. 711 807  
 v. New York, N. H. & H. R. Co., 150 N. Y. Supp. 99 874  
 Knoxville v. Knoxville Water Co., 212 U. S. 1 69, 73  
 Knudsen-Ferguson Fruit Co. v. Chicago, St. P., M. & O. R. Co., 79 C. C. A. 483, 149 Fed. 973 180, 442, 502

Koecher v. Minneapolis, St. P. & S. S. M. R. Co., 122 Minn. 458 929, 1267  
 Koehler, Ex parte, 30 Fed. 867 211, 216, 1294  
 Koennecke v. Seaboard Air Line Ry. Co., 101 S. C. 86 799, 867, 950, 1189, 1194, 1205, 1208  
 Koukouris v. Union Pac. R. Co., 193 Mo. App. 495 722, 724, 737, 956, 1031, 1040  
 Kuchenmeister v. Los Angeles & S. L. R. Co., — Utah —, 172 Pac. 725 849  
 Kuhns v. Wisconsin, I. & N. Ry. Co., 76 Iowa 67 1211

## L.

La Casse v. New Orleans, T. & M. R. Co., 135 La. 129 837, 848, 1171, 1175, 1209  
 Lafayette Ins. Co. v. French, 18 How. (U. S.) 404 551  
 Lake Erie & W. R. Co. v. Mays, 4 Ind. App. 413 419  
 v. Town of Boswell, 137 Ind. 336 1215  
 Lake Shore & M. S. Ry. Co. v. Benson, 85 Ohio St. 215 1266  
 v. Smith, 173 U. S. 684 69  
 v. State, 173 U. S. 285 40, 43  
 v. State ex rel. Lawrence, 173 U. S. 285 26, 83, 87, 90  
 La Mere v. Railway Transfer Co., 125 Minn. 526 966, 1009  
 v. Railway Transfer Co. of City of Minneapolis, 125 Minn. 159 916, 1030, 1075, 1307, 1327, 1330, 1331, 1341, 1343, 1401, 1405, 1414  
 Lamphere v. Oregon R. & Nav. Co., 116 C. C. A. 156, 196 Fed. 336 784, 787, 788, 974  
 v. Oregon R. & Nav. Co., 193 Fed. 248 789  
 Land v. St. Louis & S. F. R. Co., 95 Kan. 441 822, 916  
 Landrum v. Western & A. R. Co., 146 Ga. 88 718, 722, 725, 916, 926  
 Lang v. Choctaw, O. & G. R. Co., 117 C. C. A. 146, 198 Fed. 38 1210  
 Langdon v. Pennsylvania R. Co., 194 Fed. 486 442, 444  
 Lanis v. Illinois Cent. R. Co., 140 La. 1 737, 989, 1074

[REFERENCES ARE TO PAGES]

Lasater v. St. Louis, I. M. & S. R. Co., 177 Mo. App. 534	86	Lewis, Leonhardt & Co. v. Southern R. Co., 133 C. C. A. 237, 217 Fed. 321	286, 353, 354, 456, 459
Late Corporation of Church of Jesus Christ of Latter-Day Saints v. United States, 136 U. S. 1	205	Lexington & E. R. Co. v. Smith's Adm'r, 172 Ky. 117	733, 822, 956, 1040
Lauer v. Northern Pac. R. Co., 83 Wash. 465	724, 732, 1010, 1402, 1405	v. Stacy, 172 Ky. 195	980
Law v. Illinois Cent. R. Co., 126 C. C. A. 27, 208 Fed. 869	844	Libby v. St. Louis, I. M. & S. R. Co., 137 Mo. App. 276	575
Lawrence v. Denbreens, 1 Black (U. S.) 170	575	Liberti v. Staten Island Ry. Co., — N. Y. App. Div. —, 167 N. Y. Supp. 478	740
Layton v. Missouri, 187 U. S. 356	1165	License Cases, 5 How. (U. S.) 504	49
Leavell v. Western U. Tel. Co., 116 N. C. 211	248, 766	License Tax Cases, 5 Wall. (U. S.) 462	49, 745
Lee v. Great Northern Ry. Co., — S. D. —, 163 N. W. 560	1010	Ligon v. St. Louis & S. F. R. Co., 184 Mo. App. 187	418
v. Toledo, St. L. & W. Ry. Co., 193 Fed. 685	1148	Lilly v. Charlotte, C. & A. R. Co., 32 S. C. 142	1211
Legal Tender Cases, 12 Wall. (U. S.) 457	109	v. Tobbein, 103 Mo. 477	1215
Lehigh Iron Co. v. Rupp, 100 Pa. St. 95	1095	Lindsay v. Chicago, R. I. & P. Ry. Co., — Okla. —, 155 Pac. 1173	1142
Lehigh Valley R. Co. v. American Hay Co., 135 C. C. A. 307, 219 Fed. 539	502	Lindsay & Phelps Co. v. Mullen, 176 U. S. 126	8
v. Barlow, 244 U. S. 183	767, 776, 883, 885, 887, 893	Lindsley v. Chicago, M. & St. P. Ry. Co., 36 Minn. 539	595
v. Clark, 125 C. C. A. 235, 207 Fed. 717	463, 502	Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co., 59 Fed. 400	177
v. Meeker, 128 C. C. A. 311, 211 Fed. 785	463	v. St. Louis, I. M. & S. Ry. Co., 41 Fed. 559	177
v. Pennsylvania, 145 U. S. 192	9, 248	v. St. Louis Southwestern Ry. Co., 11 C. C. A. 417, 63 Fed. 775	177, 369
v. United States, 243 U. S. 444	439, 454	Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397	237, 536
v. United States, 110 C. C. A. 513, 188 Fed. 879	448	Liverpool & L. Life & Fire Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566	12
Leibengood v. Missouri, K. & T. R. Co., 83 Kan. 25	267, 767	Lloyd v. Dollison, 194 U. S. 445	518
Leisy v. Hardin, 135 U. S. 100	9, 21, 22, 24, 30, 38, 44	v. Southern R. Co., 166 N. C. 24	842, 861, 989, 1017
Leloup v. Port of Mobile, 127 U. S. 640	11, 16, 18, 19, 38, 246	Locomotive Co. v. Massachusetts, 245 U. S. —, 62 L. Ed. —, 38 Sup. Ct. 298	18
Lemee v. Texas & P. Ry. Co., 141 La. 769	922, 1312	Logan Coal Co. v. Pennsylvania R. Co., 154 Fed. 497	342, 344, 345, 635
Lemon v. Pullman Palace Car Co., 52 Fed. 262	258, 757	Lombardo v. Boston & M. R. R., 223 Fed. 427	718, 821, 1148
Lennon, Ex parte, 12 C. C. A. 134, 64 Fed. 320	177	Long v. Biddle, 124 Ark. 127	708, 718, 775, 810, 814, 820, 1053, 1057
Lennon, In re, 166 U. S. 548	177	v. Lehigh Valley R. Co., 65 C. C. A. 354, 130 Fed. 870	483
Lett v. St. Lawrence & O. R. Co., 11 Ont. App. 1	1112		
Lewis v. Denver & R. G. R. Co., 131 Minn. 122	718, 1180		

[REFERENCES ARE TO PAGES]

- Long v. Southern R. in Kentucky, 155 Ky. 286 916, 919, 972
- Long Island Water-Supply Co. v. City of Brooklyn, 166 U. S. 685 518
- Loomis v. Lehigh Valley R. Co., 240 U. S. 43 443, 449, 463, 492, 500
- Looney v. Crane Co., 245 U. S. 178 18
- v. Oregon Short Line R. Co., 271 Ill. 538 171, 529, 539
- Lord v. Goodall, Nelson & Perkins Steamship Co., 102 U. S. 541 743, 766
- Lorick v. Seaboard Air Line Ry., 102 S. C. 276 801, 843, 1271, 1302
- Lottery Case, 188 U. S. 321 11, 14
- Louis Werner Saw Mill Co. v. Kansas City Southern R. Co., 194 Mo. App. 618 761, 770, 1301
- Louisiana v. State, 176 U. S. 1 25, 27, 47
- Louisiana Ry. & Nav. Co. v. Holly, 127 La. 615 439, 452, 467, 745
- Louisiana & P. Ry. Co. v. United States, 209 Fed. 244 654
- Louisville, H. & St. L. R. Co. v. Wright, 170 Ky. 230 980, 988, 989, 1009
- Louisville, N. A. & C. Ry. Co. v. Rush, 127 Ind. 545 1112, 1114
- v. Wright, 134 Ind. 509 1095
- Louisville, N. O. & T. Ry. Co. v. State, 133 U. S. 587 420
- Louisville & N. R. Co. v. Allen, 152 Ky. 145 267, 439, 461, 467, 477, 479, 767, 1299
- v. Allen's Adm'r, 174 Ky. 736 925, 952, 953
- v. Barrett, 143 Ga. 742 1195
- v. Behlmer, 175 U. S. 648 207, 217, 318, 382, 383, 384, 651
- v. Blankenship, — Ala. —, 74 So. 960 703, 718, 775, 814, 835, 1030, 1049
- v. Carter, 195 Ala. 382 703, 705, 722, 775, 810
- v. Central Stock Yards Co., 212 U. S. 132 272, 763, 886
- v. Coatney, — Ga. App. —, 93 S. E. 228 916
- v. Com., 183 U. S. 503 40, 72
- v. Coquillard Wagon Works' Assignees, 147 Ky. 530 452, 457
- v. Crowe, 156 Ky. 27 316
- Louisville & N. R. Co. v. Dickerson, 112 C. C. A. 295, 191 Fed. 705 437, 438, 443
- v. Eubank, 184 U. S. 27 38, 40, 44
- v. F. W. Cook Brewing Co., 223 U. S. 70 17, 21, 22, 38, 263, 492
- v. Fleming, 194 Ala. 51 993, 1040, 1075
- v. Garrett, 231 U. S. 298 72, 73, 83
- v. Gidley, 119 Ala. 523 596
- v. Heinig's Adm'r, 162 Ky. 14 1032, 1042
- v. Henry, 167 Ky. 151 916, 980
- v. Hobbs, 136 Tenn. 512 173, 453, 532
- v. Holloway, 246 U. S. —, 62 L. Ed. —, 38 Sup. Ct. 379 1076
- v. Holloway's Adm'r, 168 Ky. 262 1032, 1042, 1064, 1065, 1073, 1075, 1090, 1091, 1147, 1201, 1238
- v. Holloway's Adm'r, 163 Ky. 125 733, 764, 855, 926, 1034, 1042, 1064, 1201
- v. Johnson's Adm'r, 161 Ky. 824 732, 733, 929, 969
- v. Jones, 6 Ala. App. 617 316
- v. Kemp, 140 Ga. 657 722, 821, 823, 916, 926, 946, 971, 1041
- v. Lankford, 126 C. C. A. 247, 209 Fed. 321 963, 1025, 1040
- v. Layton, 243 U. S. 617 1266, 1269, 1309, 1311, 1340, 1345, 1346, 1347
- v. Layton, 145 Ga. 886 1194, 1307, 1310
- v. McMullen, 5 Ala. App. 662 451, 477
- v. Maxwell, 237 U. S. 94 449, 450, 460, 466, 558
- v. Meadors' Adm'r, 176 Ky. 765 761, 767, 770, 885
- v. Melton, 218 U. S. 36 706, 1155
- v. Miller, 156 Ky. 677 172, 543
- v. Montgomery, 136 Tenn. 171 453
- v. Moore, 156 Ky. 708 734, 848, 1194, 1232
- v. Mottley, 219 U. S. 467 182, 316, 418, 434, 436, 438, 450, 475, 480, 481, 1133
- v. Mottley, 211 U. S. 149 316

[REFERENCES ARE TO PAGES]

Louisville & N. R. Co. v. Nether-  
ton, 175 Ky. 159 703, 775,  
814, 850, 916  
v. Ohio Valley Tie Co., 242  
U. S. 288 463, 514  
v. Parker, 242 U. S. 13 777,  
867, 880, 881  
v. Parker's Adm'r, 165 Ky.  
658 822  
v. Paschal, 145 Ga. 521 942,  
945, 955, 959, 1040, 1074  
v. Patrick, 167 Ky. 118  
927, 980, 989, 1009  
v. Price, 111 Miss. 3 172  
v. Rhoda, 238 U. S. 608 721,  
946, 947, 1155  
v. Rhoda, — Fla. —, 74 So.  
19 722, 725, 731, 733,  
854, 914, 916, 932, 934,  
942, 946, 947, 953  
v. Rhoda, 71 Fla. 526 947  
v. Sanders, 86 Ky. 259 1142  
v. Scott, 219 U. S. 209 170  
v. Scott, 133 Ky. 724 532  
v. Simrall's Adm'r, 31 Ky.  
L. Rep. 1269 1142  
v. State, 161 U. S. 677 40,  
47, 70, 97, 743  
v. State, — Ala. —, 76 So.  
505 1500  
v. Steel, — Ky. —, 202 S.  
W. 878 130  
v. Stewart, 241 U. S. 261  
980, 987, 994, 1091,  
1162, 1169, 1247  
v. Stewart's Adm'r, 156  
Ky. 550 734, 1197  
v. Stiles, Gaddie & Stiles,  
132 Ky. 786 1487  
v. Strange's Adm'r, 156  
Ky. 439 735, 764, 769,  
857, 858, 884, 1231  
v. Thomas' Adm'r, 171 Ky.  
471 1244  
v. Thomas' Adm'r, 170 Ky.  
145 1042, 1063, 1065,  
1074, 1101, 1124, 1201, 1238  
v. United States, 238 U. S.  
1 284, 335, 449, 649  
v. United States, 108 C. C.  
A. 326, 186 Fed. 280  
1286, 1420  
v. United States, 225 Fed.  
571 651  
v. United States, 197 Fed.  
58 395  
v. Walker's Adm'r, 162  
Ky. 209 729, 785, 786,  
814, 822, 832, 834, 974  
v. Wene, 121 C. C. A. 245,  
202 Fed. 837 945, 956,  
1031, 1040

Louisville & N. R. Co. v. West  
Coast Naval Stores Co., 198  
U. S. 483 295, 538  
v. Williams' Adm'r, 175 Ky.  
679 822, 832, 980, 1009  
v. Winkler, 162 Ky. 843  
929, 1131  
v. Wynn, 88 Tenn. 320 595  
Loveless v. Louisville & N. R.  
Co., — Ala. —, 75 So. 7 703,  
705, 718, 775, 846  
Lucas v. Peoria & E. Ry. Co.,  
171 Ill. App. 1 1287  
Lucchetti v. Philadelphia & R.  
Ry. Co., 233 Fed. 137 718,  
773, 807, 1180, 1193  
Lucid v. E. I. Du Pont de  
Nemours Powder Co., 118 C.  
C. A. 61, 199 Fed. 377 952  
Luken v. Lake Shore & M. S. R.  
Co., 248 Ill. 377 744, 1267,  
1307, 1310  
Lumber Co. v. Atlantic Coast  
Line R. Co., 141 N. C. 171 1420  
Lundeen v. Great Northern R.  
Co., 128 Minn. 332 1064, 1104  
Lundquist v. Grand Trunk  
Western Ry. Co., 121 Fed. 915  
410  
Lusk v. Atkinson, 268 Mo. 109  
41, 277, 744, 760, 761  
v. Long, 127 Ark. 261 559  
v. Osborn, 127 Ark. 170  
915, 955, 1050, 1149, 1150  
v. Town of Dora, 224 Fed.  
650 86, 87  
Lynch v. Boston & M. R. R.,  
227 Mass. 123 724, 775, 901, 905  
v. Delaware & H. Co., —  
N. Y. App. Div. —, 170  
N. Y. Supp. 412 918  
v. New York Cent. & H.  
River R. Co., 89 N. Y.  
Misc. 472 81, 543  
Lynch's Adm'r v. Central  
Vermont R. Co., 89 Vt. 363  
761, 783, 822, 843, 855, 1040  
Lyon v. Charleston & W. C. Ry.,  
— S. C. —, 56 S. E. 18 1329

## M.

M. C. Kiser Co. v. Central of  
Georgia Ry. Co., 152 C. C. A.  
552, 239 Fed. 718 640  
v. Central of Georgia Ry.  
Co., 236 Fed. 573 450, 640  
v. Central of Georgia Ry. Co.,  
158 Fed. 193 640  
McAdow v. Kansas City West-  
ern R. Co., 100 Kan. 309 1131

[REFERENCES ARE TO PAGES]

- McAdow v. Kansas City Western R. Co., 192 Mo. App. 540  
732, 733, 753, 755, 1229
- McAuliffe v. New York Cent. & H. River R. Co., 172 N. Y. App. Div. 597 855, 956, 1031, 1042, 1128
- v. New York Cent. & H. River R. Co., 164 N. Y. App. Div. 846 859
- McBain v. Northern Pac. Ry. Co., — Mont. —, 160 Pac. 654 732
- v. Northern Pac. R. Co., 52 Mont. 578 776, 783, 857, 895, 1181, 1184
- McBride v. Burlington, C. R. & N. Ry. Co., 97 Iowa 91 1142
- McCabe v. Atchison, T. & S. F. R. Co., 235 U. S. 151 420
- McCall v. California, 136 U. S. 104 9, 11, 38, 42
- v. Lee, 120 Ill. 261 1215
- McChesney v. Illinois Cent. R. Co., 197 Fed. 85 1148
- McClaine v. Rankin, 197 U. S. 154 523
- McCluskey v. Marysville & N. R. Co., 243 U. S. 36 21, 272, 273, 741, 761, 796
- McConnell v. New York Cent. & H. River R. Co., 163 N. C. 504 81
- McCoullough v. Chicago, R. I. & P. R. Co., 160 Iowa 524 733, 919, 1081, 1087, 1089, 1101, 1147
- McCrary v. United States, 195 U. S. 27 55
- McCready v. Virginia, 94 U. S. 391 13
- McCulloch v. Maryland, 4 Wheat. (U. S. ) 316 38, 50
- McCutchen v. Atlantic Coast Line R. Co., 81 S. C. 71 744
- McDermon v. Southern Pac. Co., 122 Fed. 669 757
- McDermott v. State, 228 U. S. 115 20, 21, 50
- McDonald v. Railway Transfer Co. of Minneapolis, 121 Minn. 273 703, 966, 1030, 1032, 1195, 1196
- v. State of Nebraska, 41 C. C. A. 278, 101 Fed. 171 1215
- McElvain v. St. Louis & S. F. R. Co., 176 Mo. App. 379 81, 547, 559
- McGarvey's Guardian v. McGarvey's Adm'r, 163 Ky. 242 722, 1064, 1084
- McGovern v. Philadelphia & R. R. Co., 235 U. S. 389 987, 1024, 1053, 1055
- v. Philadelphia & R. R. Co., 209 Fed. 975 1055
- McGuire v. Chicago, B. & Q. R. Co., 131 Iowa 340 744
- McInnis v. New Orleans & N. E. R. Co., 109 Miss. 482 78
- McIntosh v. St. Louis & S. F. R. Co., 182 Mo. App. 288 733, 781, 814, 1182, 1190, 1196, 1199, 1200
- McKay v. New England Dredging Co., 92 Me. 454 1095
- McKee v. Ohio Valley Elec. R. Co., 78 W. Va. 131 703, 719, 753, 773, 778, 811, 819
- McKibbin v. Great Northern Ry. Co., 78 Minn. 232 290
- McLean v. State, 211 U. S. 539 50
- McManus v. Chicago Great Western R. Co., 156 Iowa 359 439, 467
- McMillan v. Chicago, R. I. & P. R. Co., 147 Iowa 596 81
- v. Spider Lake Saw Mill & Lumber Co., 115 Wis. 332 1055
- McNaney v. Chicago, R. I. & P. R. Co., 132 Minn. 391 922, 1368, 1372
- McNeill v. Southern R. Co., 202 U. S. 543 208, 283, 294, 743, 761, 770, 1284, 1300
- M'Niel v. Holbrook, 12 Pet. (U. S. ) 84 735, 1138
- McNulta v. Ensch, 134 Ill. 46 757
- v. Lockridge, 137 Ill. 270 756
- McQueen v. Central Branch U. P. R. Co., 30 Kan. 689 785
- Macon, D. & S. R. Co. v. Musgrove, 145 Ga. 647 980, 989, 1006, 1015
- v. Robinson, 19 Ga. App. 370 784, 798, 799, 897, 1039
- Macon Grocery Co. v. Atlantic Coast Line R. Co., 215 U. S. 501 457, 714
- Maijala v. Great Northern R. Co., 133 Minn. 301 822, 916, 932, 951
- Maiorano v. Baltimore & O. R. Co., 216 Pa. 402 1055
- Majestic, The, 166 U. S. 375 1473
- Majestic Coal & Coke Co. v. Illinois Cent. R. Co., 162 Fed. 810 342, 635
- Malloy v. Northern Pac. Ry. Co., 151 Fed. 1019 979



# TABLE OF CASES.

1819

[REFERENCES ARE TO PAGES]

Malott v. Hood, 201 Ill.	202	Memphis & C. R. Co. v. Reeves,	10 Wall. (U. S.) 176	574,
	1281, 1287			596, 598
Manhattan Trust Co. v. Sioux		Memphis & L. R. R. Co. v.		
City Cable Ry. Co., 68 Fed.	82	Southern Exp. Co., 117 U. S.	1	177
Manning v. Chicago Great				
Western R. Co., 135 Minn.	229	Menacho v. Ward, 27 Fed.	529	
	722, 731, 733, 952, 953		142, 304, 305	
Manson v. Great Northern R.		Merchants' Transfer Co. v.		
Co., 31 N. D. 643 723. 737.	915, 926, 956, 981, 1031, 1040	Board of Review City of Des		
Manufacturers' Gas & Oil Co.		Moines, 128 Iowa 732		744
v. Indiana Natural Gas & Oil		Merchants' & Manufacturers'		
Co., 156 Ind. 679	12	Traffic Ass'n of Sacramento		
Manufacturers' Ry. Co. v.		v. United States, 231 Fed.	292	651
United States, — U. S. —,	62 L. Ed. —, 38 Sup. Ct. 383	Merriman v. Great Northern		
	203, 205	Exp. Co., 63 Minn. 543		575
Marshall v. Chicago, R. I. & P.		Messenger v. Pennsylvania R.		
R. Co., 133 Minn. 392 733,	815, 989, 1009, 1247	Co., 36 N. J. L. 407		306
Martin v. Atchison, T. & S. F.		Metallic Compression Casting		
R. Co., 93 Kan. 681 916, 937		Co. v. Fitchburg R. Co., 109		
v. New York, N. H. & H. R.		Mass. 277		1347
Co., 241 Fed. 696 757,	909, 1148	Metcalf v. Williams, 144 Mass.	452	1240
v. Northern Pac. R. Co., 87		Metz v. Missouri Pac. R. Co.,	90 Kan. 463	452
Wash. 91	915	Meyer v. Vicksburg, S. & P. R.		
v. Pittsburgh Rys. Co., 227		Co., 41 La. Ann. 639		582
Pa. 18	1211	v. Wells, Fargo & Co., 223		
v. Pittsburgh & L. E. R.		U. S. 298		18, 38, 42
Co., 203 U. S. 284	40, 743	Michaels v. New York Cent. R.		
v. Waddell, 16 Pet. (U. S.)	367	Co., 30 N. Y. 564		574, 596
	743	Michelson v. Judson Freight		
Mathews v. Alabama Great		Forwarding Co., 268 Ill. 546		171
Southern R. Co., — Ala. —,	76 So. 17	Michie v. New York, N. H. &		
	705, 775	H. R. Co., 151 Fed. 694		295
Mathis v. Kansas City South-		Michigan Cent. R. Co. v. Mich-		
ern R. Co., 140 La. 855	1409	igan R. R. Commission, 236		
Maxwell v. Dow, 176 U. S. 581	1237	U. S. 615		69, 742
May v. City of New Orleans,	178 U. S. 496	v. Schaffer, 136 C. C. A.		
	25	413, 220 Fed. 809		987, 994
Mayers v. Union R. Co., 256		v. Smithson, 45 Mich. 212		1253
Pa. 474	732, 974	v. Vreeland, 227 U. S. 59		
Meadows v. Postal Telegraph		39, 724, 732, 783, 946,		
& Cable Co., 173 N. C. 240	247	1063, 1065, 1082, 1083,		
Mechanical Appliance Co. v.		1088, 1089, 1092, 1094,		
Castleman, 215 U. S. 437	550	1098, 1105, 1111, 1125,		
Meeker v. Lehigh Valley R.		1200, 1202		
Co., 236 U. S. 412 321, 463,	502, 505, 516, 518, 523, 527	Michigan Ins. Bank v. Eldred,		
v. Lehigh Valley R. Co.,	162 Fed. 354	130 U. S. 693		523
	463	Michigan R. R. Commission v.		
Meetze v. Southern Exp. Co.,	91 S. C. 379	Detroit & M. R. Co., 178		
	545	Mich. 230		78
Melody v. Great Northern R. Co.,	25 S. D. 606	Midland Valley R. Co. v. Bell,		
	458	155 C. C. A. 391, 242 Fed.		
Melzner v. Northern Pac. R.		803		928
Co., 46 Mont. 277	1057, 1200	v. Ennis, 109 Ark. 206 734,		
		1181, 1184, 1194, 1205, 1212		
		v. Fulgham, 104 C. C. A.		
		151, 181 Fed. 91		952,
				953, 973

[REFERENCES ARE TO PAGES]

- Midland Valley R. Co. v. Le-  
moynes, 104 Ark. 327 1146, 1178
- Miller v. Atchison, T. & S. F.  
R. Co., 97 Kan. 782 171
- v. Kansas City Western R.  
Co., 180 Mo. App. 371  
703, 718, 857
- v. Mansfield, 112 Mass. 260 346
- v. Michigan Cent. R. Co.,  
185 Mich. 432 916, 918, 926
- v. State, 153 U. S. 535 1159
- v. United States, 11 Wall.  
(U. S.) 268 109
- Mills v. Lehigh Valley R. Co.,  
238 U. S. 473 321, 492, 516
- v. Missouri, K. & T. Ry. Co.  
of Texas, 94 Tex. 242 420
- Milne v. Chicago, R. I. & P. R.  
Co., 155 Mo. App. 465 582
- Milwaukee & St. P. Ry. Co. v.  
Kellogg, 94 U. S. 469 942,  
944, 945, 1327, 1345
- Mims v. Atlantic Coast Line R.  
Co., 100 S. C. 375 705, 1196,  
1205, 1208
- Minneapolis, St. P. & S. S. M.  
R. Co. v. Popplar, 237 U. S.  
369 1155, 1160, 1162, 1288,  
1340, 1342, 1351, 1406, 1409
- Minneapolis & St. L. R. Co. v.  
Bombolis, 241 U. S. 211 733,  
1154, 1238, 1416
- v. Gotschall, 244 U. S. 66  
952, 1126, 1309, 1340,  
1343, 1346, 1347
- v. Herrick, 127 U. S. 210 706
- v. Minnesota, 186 U. S. 257  
40, 69, 72, 91
- v. Minnesota ex rel. Railroad  
Warehouse Commission,  
193 U. S. 53 70
- v. Nash, 242 U. S. 619 776,  
835, 836, 1154
- v. United States, 157 C. C.  
A. 356, 245 Fed. 60  
1447, 1453
- v. Winters, 242 U. S. 353  
776, 810, 827, 828, 835,  
844, 850, 882, 1154
- Minnesota Rate Cases (Simpson  
v. Shepard), 230 U. S. 352  
56, 74, 147, 285, 492
- Mires v. St. Louis & S. F. R. Co.,  
134 Mo. App. 379 268, 477, 767
- Mississippi R. R. Commission v.  
Illinois Cent. R. Co., 203 U. S.  
335 38, 43, 87, 743
- v. Mobile & O. R. Co., 244  
U. S. 388 83, 84
- Missouri, K. & T. Ry. Co. v.  
Bowles, 1 Indian Terr. 250 457
- v. Byrne, 40 C. C. A. 402,  
100 Fed. 359 945, 1327
- v. Haber, 169 U. S. 613 26,  
40, 47, 51, 55, 56, 93, 743
- v. Hancock & Goodbar, 26  
Okla. 265 574
- v. Harriman, 227 U. S. 657  
56, 59, 81, 170, 249, 451,  
531, 544, 559, 567, 569,  
572, 594
- v. Lenahan, 39 Okla. 283  
1147, 1171, 1173, 1209
- v. McCann, 174 U. S. 580 537
- v. McFadden, 89 Tex. 138 596
- v. New Era Milling Co., 80  
Kan. 141 770
- v. State, 245 U. S. 484 87
- v. Town of Witcher, 25  
Okla. 586 87
- v. United States, 231 U. S.  
112 1444, 1445, 1447,  
1449, 1450, 1471
- v. Walston, 37 Okla. 517  
81, 173, 452, 544
- v. West, 38 Okla. 581 729,  
907, 937
- v. Wulf, 226 U. S. 570 777,  
1142, 1162, 1167, 1171,  
1173, 1195, 1210, 1214, 1216
- Missouri, K. & T. Ry. Co. of  
Texas v. Barrington, — Tex.  
Civ. App. —, 173 S. W. 595  
1365, 1367, 1368, 1371, 1402
- v. Blalack, 105 Tex. 296  
729, 908
- v. Bunkley, — Tex. Civ.  
App. —, 153 S. W. 937  
965, 1032, 1149
- v. Denahy, — Tex. Civ.  
App. —, 165 S. W. 529 844
- v. Freeman, — Tex. Civ.  
App. —, 168 S. W. 69  
994, 1026
- v. Hailey, — Tex. Civ. App.  
—, 156 S. W. 1119 541
- v. Harriman Bros., — Tex.  
Civ. App. —, 128 S. W.  
932 532
- v. Harris, 234 U. S. 412  
46, 542
- v. Hawley, 58 Tex. Civ.  
App. 143 706, 1181, 1203
- v. Meek, 33 Tex. Civ. App.  
47 291
- v. Mooney, — Tex. Civ.  
App. —, 181 S. W. 543  
723, 822, 827

[REFERENCES ARE TO PAGES]

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 Texas v. Neaves, 60 Tex. Civ.  
 App. 305 1181, 1203  
 v. Pace, — Tex. Civ. App.  
 —, 184 S. W. 1051 276,  
 705, 768, 858, 884, 1031  
 v. Rentz, — Tex. Civ. App.  
 —, 162 S. W. 959 785,  
 787, 788, 864  
 v. Sadler, — Tex. Civ.  
 App. —, 149 S. W. 1188  
 705  
 v. Scott, — Tex. Civ. App.  
 —, 160 S. W. 432 981  
 v. Stark Grain Co., 103  
 Tex. 542 531  
 v. Turner, — Tex. Civ.  
 App. —, 138 S. W. 1126 705  
 v. Ward, 244 U. S. 383 541,  
 586, 608  
 v. Watson, — Tex. Civ.  
 App. —, 195 S. W. 1177  
 705, 833  
 Missouri, O. & G. Ry. Co. v.  
 French, — Okla. —, 152 Pac.  
 591 173, 530  
 v. Plemmons, — Tex. Civ.  
 App. —, 171 S. W. 259  
 1367, 1371, 1402  
 Missouri Pac. R. Co. v. Brink-  
 meier, 77 Kan. 14 1420  
 v. Castle, 224 U. S. 541 39,  
 99, 706, 742  
 v. Fitzgerald, 160 U. S. 556  
 1416  
 v. Larabee Flour Mills Co.,  
 211 U. S. 612 25, 40, 46,  
 56, 72  
 v. Nebraska, 217 U. S. 196 78  
 v. State, 217 U. S. 196 69, 83  
 v. State, 164 U. S. 403 69, 78  
 v. State ex rel. Taylor, 216  
 U. S. 262 25, 45, 70, 82, 83  
 v. Taber, 244 U. S. 200 1159  
 v. Texas & P. Ry. Co., 30  
 Fed. 2 306  
 v. Tucker, 230 U. S. 340 83  
 v. United States, 128 C. C.  
 A. 271, 211 Fed. 893  
 1435, 1465  
 Missouri Rate Cases, 230 U. S.  
 474 40  
 Mitchel Coal & Coke Co. v.  
 Pennsylvania R. Co., 230 U. S.  
 247 180, 342, 442, 443, 451,  
 463, 489, 492, 495, 500, 654  
 v. Pennsylvania R. Co., 181  
 Fed. 403 358, 504, 1211  
 Mitchell & Co. v. Atlantic Coast  
 Line R. Co., 15 Ga. App. 797  
 171, 542, 559  
 Mitchie v. New York, N. H. &  
 H. R. Co., 151 Fed. 694 448  
 Mobile, County of v. Kimball,  
 102 U. S. 691 9, 15, 51, 93,  
 97, 690  
 Mobile, J. & K. C. R. Co. v.  
 Bromberg, 141 Ala. 258 1287,  
 1300, 1352  
 Mobile & O. R. Co. v. United  
 States, 126 C. C. A. 427, 209  
 Fed. 605 1488  
 Model Mill Co. v. Carolina, C. &  
 O. R. Co., 136 Tenn. 211 592  
 Moffett v. Baltimore & O. R.  
 Co., 135 C. C. A. 607, 220  
 Fed. 39 1053, 1057, 1063,  
 1074, 1104, 1106, 1200, 1201  
 Moliter v. Wabash R. Co., 180  
 Mo. App. 84 722, 855, 874,  
 1160, 1164, 1182, 1184, 1205,  
 1212  
 Molzoff v. Chicago, M. & St. P.  
 R. Co., 162 Wis. 451 785,  
 917, 945, 956  
 Mondou v. New York, N. H. &  
 H. R. Co., 223 U. S. 1 39, 99,  
 719, 974, 1013, 1125, 1146  
 Montana, W. & S. R. Co. v.  
 Morley, 198 Fed. 991 635  
 Montgomery v. Carolina & N.  
 W. R. Co., 169 N. C. 249  
 1075, 1405  
 v. Carolina & N. W. R. Co.,  
 163 N. C. 597 969, 1307,  
 1311, 1344, 1353  
 v. Southern Pac. Co., 64 Ore.  
 597 732, 874, 899, 1267  
 Montgomery & E. R. Co. v.  
 Culver, 75 Ala. 587 600  
 Moore v. American Transp. Co.,  
 24 How. (U. S.) 1 743  
 v. Lehigh Valley R. Co., 169  
 N. Y. App. Div. 177 58  
 v. St. Joseph & G. I. R. Co.,  
 268 Mo. 31 922, 923,  
 1049, 1149, 1281, 1307,  
 1310, 1312, 1344, 1405  
 Moran v. Central R. Co. of  
 New Jersey, 245 U. S. 629 887  
 v. Central R. Co. of New  
 Jersey, 88 N. J. L. 730  
 761, 881, 887  
 Moran, Eugene F., The v. New  
 York Cent. & H. River R. Co.,  
 212 U. S. 466 1347  
 Morey v. Monk, 145 Ala. 301 1106  
 Morgan's Louisiana & T. R. &  
 S. S. Co. v. Louisiana Board  
 of Health, 118 U. S. 455 26, 97

[REFERENCES ARE TO PAGES]

Morganton Mfg. Co. v. Ohio R. & C. Ry. Co., 121 N. C. 514	600	Mutual Transit Co. v. United States, 102 C. C. A. 164,	178
Morphis v. Southern Exp. Co., 167 N. C. 139	81	Fed. 664	212, 218
Morris v. Duluth, S. S. & A. Ry. Co., 47 C. C. A. 661,	108	Myers v. Norfolk & W. R. Co., 162 N. C. 343	789
Fed. 747	1410	Myrick v. Michigan Cent. R. Co., 107 U. S. 102	168, 538
v. Southern R. Co., 19 Ga. App. 495	542	N.	
Morrisdale Coal Co. v. Pennsylvania R. Co., 230 U. S. 304	342, 343, 463, 489, 492, 493, 635		
v. Pennsylvania R. Co., 176 Fed. 748	460, 489	Narey v. Minneapolis & St. L. R. Co., 177 Iowa 606	705
Morrison v. Baltimore & O. R. Co., 40 App. Cas. (D. C.) 391	1140	Nash v. Minneapolis & St. L. R. Co., 131 Minn. 166	836
v. Commercial Towboat Co., — Mass. —, 116 N. E. 499	745, 783	Nashville, C. & St. L. Ry. Co. v. Abramson-Boone Produce Co., — Ala. —, 74 So. 350	542
v. Watson, 154 U. S. 111	1159	v. Alabama, 128 U. S. 96	15, 45, 46, 93, 97, 99, 690
Morrison Grain Co. v. Missouri Pac. R. Co., 182 Mo. App. 339	81, 172, 456, 529, 582, 583	v. Anderson, 134 Tenn. 666	1064, 1065, 1073, 1074, 1075, 1087, 1089, 1092, 1171, 1173, 1181, 1187
Mott Store Co. v. St. Louis & S. F. R. Co., 184 Mo. App. 50	452, 477	v. Banks, 156 Ky. 609	855, 856, 873, 892, 1032, 1042, 1045, 1047
Moyer v. Pennsylvania R. Co., 247 Pa. 210	764, 799, 803, 855, 874, 1344	v. C. V. Truitt Co., 17 Ga. App. 236	171, 542, 594, 595
Moyse v. Northern Pac. R. Co., 41 Mont. 272	937	v. Dreyfuss-Weil Co., 150 Ky. 333	592
Mugler v. State, 123 U. S. 623	13	v. Henry, 158 Ky. 88	922, 1042, 1073, 1307, 1310, 1343
Muir v. Louisville & N. R. Co., 247 Fed. 888	109	v. Lillie, 112 Tenn. 331	291
Mulhall v. Fallon, 176 Mass. 266	1055	Nashville Grain Exchange v. United States, 234 Fed. 699	651
Mulligan v. Atlantic Coast Line R. Co., 104 S. C. 173	734, 917, 919, 925, 950	Nashville & C. R. Co. v. Estes, 10 Lea (Tenn.) 749	575
Munn v. People, 94 U. S. 113	71, 304	Nason v. Chicago, R. I. & P. R. Co., 140 La. 533	1135
Munro v. Pacific Dredging & Reclamation Co., 84 Cal. 515	1111	Nathan v. Louisiana, 8 How. (U. S. ) 73	13
Murker v. Northern Pac. Ry. Co., 95 Wash. 280	734, 1143	National Pole Co. v. Chicago & N. W. R. Co., 127 C. C. A. 561,	211 Fed. 65
Murphy v. Nowak, 223 Ill. 301	1107	561, 211 Fed. 65	495
Murray v. Chicago & N. W. Ry. Co., 35 C. C. A. 62,	92 Fed. 868	National Rice Milling Co. v. New Orleans & N. E. R. Co., 132 La. 615	172, 543
v. Chicago & N. W. Ry. Co., 62 Fed. 24	1418	Nebraska Transfer Co. v. Chicago, B. & Q. R. Co., 90 Neb. 488	443
Mutual Film Corporation of Missouri v. Hodges, 236 U. S. 248	16	Neil v. Idaho & W. N. R. R., 22 Idaho 74	862, 919, 1030, 1032, 1203
Mutual Life Ins. Co. v. McGrew, 188 U. S. 291	1164	Nelson v. Illinois Cent. R. Co., 173 Iowa 161	728
		v. Minneapolis St. Ry. Co., 61 Minn. 167	1135
		v. Southern Ry. Co., 246 U. S. 253	914, 918
		v. United States, 201 U. S. 92	679

[REFERENCES ARE TO PAGES]

Neth v. Delano, 184 Mo. App. 652	1022	New York ex rel. Pennsylv- ania R. Co. v. Knight, 192 U. S. 21	747, 762
New England Exp. Co. v. Maine Cent. R. Co., 57 Me. 188	304	New York ex rel. Silz v. Hest- erberg, 211 U. S. 31	28, 45
New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (U. S. ) 344	506	New York, I. E. & W. R. Co. v. Estill, 147 U. S. 591	536
New Mexico ex rel. E. J. Mc- Lean & Co. v. Denver & R. G. R. Co., 203 U. S. 38	70	New York Life Ins. Co. v. Cravens, 178 U. S. 389	12
New Orleans, City of v. Ben- jamin, 153 U. S. 411	1416	v. Deer Lodge County, 231 U. S. 495	10, 12
New Orleans, M. & C. R. Co. v. Jones, 111 Miss. 852 703, 718, 722, 724, 725, 773, 1053, 1057, 1064		New York, N. H. & H. R. Co. v. Ballou & Wright, — C. C. A. —, 242 Fed. 862	508
New Orleans & N. E. R. Co. v. Harris, 246 U. S. —, 62 L. Ed. —, 38 Sup. Ct. 535	915, 933, 949, 1071	v. Bork, 23 R. I. 218	340
v. National Rice Milling Co., 234 U. S. 80	596	v. Interstate Commerce Commission, 200 U. S. 361 154, 155, 308, 318, 436, 450, 480	
New York v. Miln, 11 Pet. (U. S. ) 102	26	v. People, 165 U. S. 628 45, 93, 98	
New York, C. & St. L. R. Co. v. Niebel, 131 C. C. A. 248, 214 Fed. 952 1040, 1041, 1088, 1118		v. Pontillo, 128 C. C. A. 573, 211 Fed. 331	970
New York Cent. R. Co. v. Lockwood, 17 Wall. (U. S.) 357	237, 558	v. Scoville, 71 Conn. 136	339
v. White, 243 U. S. 188 704, 706, 810		v. Vizvari, 126 C. C. A. 632, 210 Fed. 118	980
v. Winfield, 244 U. S. 147 58, 723, 725, 727, 776, 821, 946		v. Walsh, 223 U. S. 1	719
New York Cent. & H. River R. Co. v. Banker, 140 C. C. A. 37, 224 Fed. 351	1128	v. York & Whitney Co., 215 Mass. 36 439, 456, 467	
v. Beaham, 242 U. S. 148 170, 531, 558, 597		New York, P. & N. R. Co. v. Cromwell, 98 Va. 227	293
v. Board Chosen Freeholders County of Hudson, 227 U. S. 248	56, 215	v. Peninsula Produce Exch. of Maryland, 240 U. S. 34 80, 170, 450, 530, 539, 588	
v. Carr, 238 U. S. 260 777, 779, 780, 782, 783, 842, 854, 860, 871, 880, 1155		Newborn & Co. v. Louisville & N. R. Co., 170 N. C. 205	173
v. General Elec. Co., 83 N. Y. Misc. 529	442	Newkirk v. Pryor (Mo. App.), 183 S. W. 682 731, 840, 1032, 1040, —1042, 1064, 1065	
v. Gray, 239 U. S. 583	82	Nichols v. Chesapeake & O. R. Co., 115 C. C. A. 601, 195 Fed. 913 1310, 1359, 1410, 1423	
v. Salkaukus, 151 C. C. A. 628, 238 Fed. 778	980	Nichols & Cox Lumber Co. v. United States, 129 C. C. A. 124, 212 Fed. 588 353, 354, 355	
v. Tonsellito, 44 U. S. 360	728	Niel v. Idaho & W. N. R. R., 92 Idaho 74	871
v. United States, 212 U. S. 500 165, 436, 439, 451, 460		Niles v. Central Vermont R. Co., 87 Vt. 356	1026, 1187
New York ex rel. Hatch v. Reardon, 204 U. S. 152	13	Noble v. Mitchell, 164 U. S. 367 10	
		Noel v. Quincy, O. & K. C. R. Co. (Mo. App.), 182 S. W. 787 783, 843, 855, 922, 1009, 1040, 1311, 1344, 1401, 1405	
		Nordgard v. Marysville & N. R. Co., 134 C. C. A. 415, 218 Fed. 737	202, 1285
		v. Marysville & N. Ry. Co., 211 Fed. 721	741, 750

[REFERENCES ARE TO PAGES]

- Norfolk Southern R. Co. v. Chatman, 244 U. S. 276 183  
 v. Ferebee, 238 U. S. 269 733, 735, 854, 1030, 1162, 1245, 1246  
 Norfolk Truckers' Exch. v. Norfolk Southern R. Co., 116 Va. 466 102, 588  
 Norfolk & W. R. Co. v. Com., 93 Va. 749 745, 764  
 v. Dixie Tobacco Co., 228 U. S. 593 81, 170, 529, 530, 532, 533, 542  
 v. Dixie Tobacco Co., 111 Va. 813 532  
 v. Earnest, 229 U. S. 114 777, 860, 1015, 1029, 1030, 1031, 1033, 1042, 1046, 1048  
 v. Hazelrigg, 107 C. C. A. 66, 184 Fed. 828 1359, 1410, 1413  
 v. Hazelrigg, 95 C. C. A. 637, 170 Fed. 551 1401, 1410, 1412  
 v. Holbrook, 235 U. S. 625 814, 1063, 1071, 1074, 1083, 1089, 1092, 1117  
 v. Holbrook, 131 C. C. A. 621, 215 Fed. 687 814, 965  
 v. Old Dominion Baggage Co., 99 Va. 111 340  
 v. Pennsylvania, 136 U. S. 114 9, 747  
 v. Short's Adm'r, 171 Ky. 647 718, 775, 854, 914, 916, 959, 1030, 1039, 1041, 1180  
 v. Stuart's Draft Milling Co., 109 Va. 184 592  
 v. Tucker's Adm'r, 120 Va. 540 917, 981, 990, 1010, 1194  
 v. United States, 112 C. C. A. 46, 191 Fed. 302 1310, 1362  
 v. United States, 101 C. C. A. 249, 177 Fed. 623 843, 1278, 1281, 1286, 1299, 1310, 1324  
 Norris v. Western U. Tel. Co.,— N. C. —, 93 S. E. 465 249  
 North Carolina R. Co. v. Zachary, 232 U. S. 248 56, 718, 733, 750, 763, 777, 788, 795, 842, 854, 861, 871, 900, 1064, 1083, 1092, 1160, 1166, 1177, 1180, 1182, 1200, 1228, 1284, 1301  
 North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727 237, 763, 886  
 Northern Alabama R. Co. v. Wilson Mercantile Co., 9 Ala. App. 269 451, 456, 477  
 Northern Pac. R. Co. v. Adams, 192 U. S. 440 183, 483  
 v. Babcock, 223 U. S. 1 719  
 v. Blake, 11 C. C. A. 93, 63 Fed. 45 1253  
 v. Dixon, 71 C. C. A. 555, 139 Fed. 737 952  
 v. Finch, 225 Fed. 676 1490  
 v. Maerkl, 117 C. C. A. 237, 198 Fed. 1 737, 844, 849, 993, 1015, 1067, 1073  
 v. Pacific Coast Lumber Manufacturers' Ass'n, 91 C. C. A. 39, 165 Fed. 1 450, 499, 522, 640  
 v. State ex rel. Atkinson, 222 U. S. 370 39, 56, 57, 99, 856, 1280, 1432  
 v. State ex rel. McCue, 236 U. S. 585 69, 83  
 v. State ex rel. McCue, 216 U. S. 579 40, 72  
 v. United States, 136 C. C. A. 200, 220 Fed. 108 1448  
 v. United States, 130 C. C. A. 157, 213 Fed. 577 1459, 1478  
 v. Wall, 241 U. S. 87 170, 530, 539, 541, 559, 563, 569, 585  
 v. Washington ex rel. Atkinson, 222 U. S. 370 56  
 Northern Securities Co. v. United States, 193 U. S. 197 8, 13, 14, 25, 47, 51, 55, 70, 690  
 Northern Trust Co. v. Grand Trunk Western Ry. Co., —Ill. —, 118 N. E. 986 1153  
 Northwestern Consol. Milling Co. v. Chicago, B. & Q. R. Co., 135 Minn. 363 598  
 Norton v. Erie R. Co., 163 N. Y. App. Div. 466 776, 858, 874  
 v. Maine Cent. R. Co., —Me. —, 100 Atl. 598 916, 981, 989  
 Norwich & W. R. Co. v. Johnson, 15 Wall. (U. S.) 195 109  
 Nunnelee v. St. Louis, I. M. & S. R. Co., 145 Mo. App. 17 575

[REFERENCES ARE TO PAGES]

## O.

- Oberlin v. Oregon-Washington R. & Nav. Co., 71 Ore. 177 723, 798, 806, 981, 1010, 1015, 1401
- O'Briant v. Pryor, — Mo. App. —, 195 S. W. 759 543, 553
- O'Connor v. Chicago, M. & St. P. R. Co., 163 Wis. 653 723, 945
- O'Dell v. Southern Ry. Co., 248 Fed. 343 846
- O'Donnell v. Providence & W. R. Co., 6 R. I. 211 1347
- Ogdensburg & L. C. R. Co. v. Pratt, 22 Wall. (U. S.) 123 168, 538, 574
- Ohio Coal Co. v. Whitcomb, 59 C. C. A. 487, 123 Fed. 359 325, 654
- Ohio River & W. Ry. Co. v. Dittey, 232 U. S. 576 17
- Ohio Valley Elec. Ry. Co. v. Brumfield's Adm'r, — Ky. —, 203 S. W. 541 819
- O'Keefe v. United States, 240 U. S. 294 68, 449
- Oklahoma v. Atchison, T. & S. F. R. Co., 220 U. S. 277 40, 70
- Oklahoma ex rel. West v. Chicago, R. I. & P. R. Co., 220 U. S. 302 69
- Okresz v. Lehigh Valley R. Co., 170 N. Y. App. Div. 15 705, 844
- Olcovich v. Grand Trunk R. Co. of Canada, 20 Cal. App. 349 499, 522
- Old Colony R. Co. v. Tripp, 147 Mass. 35 340
- Old Dominion S. S. Co. v. Flanary & Co., 111 Va. 816 541, 570
- Oliver v. Northern Pac. Ry. Co., 196 Fed. 432 729, 909
- Olivit Bros. v. Pennsylvania R. Co., 88 N. J. L. 241 172, 543
- Olsen v. Andrews, 168 Mass. 261 788
- Omaha & C. B. St. R. Co. v. Interstate Commerce Commission, 230 U. S. 324 227, 231, 752, 755
- v. Interstate Commerce Commission, 191 Fed. 40 231, 418
- v. Interstate Commerce Commission, 179 Fed. 243 231
- O'Neill v. Erie R. Co., — N. Y. App. Div. —, 169 N. Y. Supp. 1008 1031
- Oregon R. & Nav. Co. v. Campbell, 230 U. S. 525 73
- v. Campbell, 180 Fed. 253 767
- v. Thisler, 90 Kan. 5 452, 457
- Oregon Short Line R. Co. v. Homer, 235 U. S. 693 531
- Oregon Short Line & U. N. Ry. Co. v. Northern Pac. R. Co., 9 C. C. A. 409, 61 Fed. 158 177, 369
- v. Northern Pac. R. Co., 51 Fed. 465 177
- Oregon-Washington R. & Nav. Co. v. United States, 139 C. C. A. 142, 223 Fed. 596 1435
- v. United States, 123 C. C. A. 471, 205 Fed. 337 1490
- Osborn v. Lovell, 36 Mich. 250 1050
- Osborne v. Gray, 241 U. S. 16 704, 777, 781, 782, 807, 830, 857, 1180, 1204
- Osborne's Adm'r v. Cincinnati, N. O. & T. P. R. Co., 158 Ky. 176 1326, 1448, 1449
- O'Sullivan v. Felix, 233 U. S. 318 523
- Ouachita Packet Co. v. Aiken, 121 U. S. 444 97
- Overstreet v. Norfolk & W. R. Co., 151 C. C. A. 501, 238 Fed. 565 922
- Owens v. Chicago Great Western R. Co., 113 Minn. 49 919, 966

## P.

- Pace Mule Co. v. Seaboard Air Line R. Co., 160 N. C. 215 81, 531, 576
- Pacific Coast R. Co. v. United States, 98 C. C. A. 31, 173 Fed. 448 264, 1284, 1290, 1293, 1296
- Pacific Coast Steam-Ship Co. v. Board Railroad Com'rs, 18 Fed. 10 766
- Pacific Exp. Co. v. Krower, 106 Tex. 216 174, 544
- v. Ross, — Tex. Civ. App. —, 154 S. W. 340 174, 461
- v. Seibert, 142 U. S. 339 10
- Packet Co. v. McCue, 17 Wall. (U. S.) 508 788
- Padgett v. Seaboard Air Line Ry., 99 S. C. 364 865, 939
- Palmer v. Southern Exp. Co., 129 Tenn. 116 33
- v. Wichita Falls & N. W. Ry. Co., — Okla. —, 159 Pac. 1115 915, 917

[REFERENCES ARE TO PAGES]

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   Fitts, — Tex. Civ. App. —,  
   188 S. W. 528 917, 990, 1132  
   v. Phillips, — Tex. Civ.  
   App. —, 197 S. W. 1031 1488  
 Pankey v. Atchison, T. & S. F.  
   R. Co., 180 Mo. App. 185  
   917, 956, 961, 972, 1031,  
   1041, 1149  
 Papoutsikis v. Spokane, P. &  
   S. R. Co., 89 Wash. 1 917, 956  
 Park v. Southern Ry. Co., 78 S.  
   C. 302 173  
 Parker v. Atlantic City R. Co.,  
   87 N. J. L. 148 723, 922,  
   1010, 1049, 1147, 1344, 1405  
 Parker-Bell Lumber Co. v.  
   Great Northern R. Co., 69  
   Wash. 123 605  
 Parkersburg & O. River  
   Transp. Co. v. City of Park-  
   ersburg, 107 U. S. 691 45  
 Parkett v. Manistee & N. E. R.  
   Co., 175 Mich. 253 531  
 Parmelee v. Savannah, F. &  
   W. Ry., 78 Ga. 239 1211  
 Parsons v. Chicago & N. W.  
   Ry. Co., 167 U. S. 447 320,  
   437, 502  
   v. Chicago & N. W. Ry. Co.,  
   11 C. C. A. 489, 63 Fed.  
   903 393  
   v. Delaware & H. Co., 167  
   N. Y. App. Div. 536 761, 844  
 Passaic, The, 190 Fed. 644 754, 972  
 Passenger Cases, 7 How. (U.  
   S.) 283 19, 38  
 Patillo v. Allen-West Com-  
   mission Co., 65 C. C. A. 508,  
   131 Fed. 680 1212, 1215  
 Patry v. Chicago & W. I. R.  
   Co., 265 Ill. 310 718, 775,  
   799, 859  
 Patten v. Union Pac. Ry. Co.,  
   29 Fed. 590 177  
 Patterson v. Bucknall S. S.  
   Line, 203 Fed. 1021 1150  
   v. Com., 97 U. S. 501 48  
   v. Missouri Pac. R. Co.,  
   77 Kan. 236 267, 767  
 Patton v. Atchison, T. & S. F.  
   Ry. Co., — Okla. —, 158 Pac.  
   576 1132  
   v. Cincinnati, N. O. & T. P.  
   Ry., 208 Fed. 29 1148  
   v. Illinois Cent. R. Co., 179  
   Fed. 530 1371  
   v. Texas & P. Ry. Co., 179  
   U. S. 658 926, 927, 943, 952
- Patton v. Texas & P. Ry. Co., —  
   Tex. Civ. App. —, 137 S. W.  
   721 531, 544  
 Paul v. Virginia, 8 Wall. (U. S.)  
   168 12  
 Pawnee, The, 205 Fed. 333 739,  
   741, 754  
 Pearsall v. Great Northern Ry.  
   Co., 161 U. S. 646 40, 47, 70  
 Pearson v. Yewdall, 95 U. S.  
   294 518  
 Pecos Valley & N. E. R. Co. v.  
   Harris, 14 N. M. 410 439,  
   452, 458  
 Pecos & N. T. Ry. Co. v. Cox,  
   — Tex. Civ. App. —, 150 S.  
   W. 265 588  
   v. Cox, 105 Tex. 40 929  
   v. Hall, — Tex. Civ. App.  
   —, 189 S. W. 535 453  
   v. Meyer, — Tex. Civ. App.  
   —, 155 S. W. 309 539  
   v. Porter, — Tex. Civ. App.  
   —, 156 S. W. 267 438  
   v. Rosenbloom, 240 U. S.  
   439 721, 762, 903, 1154,  
   1160, 1171, 1172, 1173  
 Pedersen v. Delaware, L. & W.  
   R. Co., 229 U. S. 146 740,  
   777, 780, 783, 804, 810, 814,  
   824, 831, 834, 974, 976  
   v. Delaware, L. & W. R.  
   Co., 117 C. C. A. 33, 197  
   Fed. 537 789  
 Peede, Ex parte, 75 Tex. Cr. 247 33  
 Peek v. Boston & M. R. R., 223  
   Fed. 448 854, 1148  
 Peery v. Illinois Cent. R. Co.,  
   128 Minn. 119 806  
   v. Illinois Cent. R. Co., 123  
   Minn. 264 798, 806, 855, 866  
 Peik v. Chicago & N. W. Ry.  
   Co., 94 U. S. 164 63, 70, 71  
 Pelton v. Illinois Cent. R. Co.,  
   171 Iowa 91 798, 1229  
 Penn Refining Co., Ltd. v.  
   Western New York & P. R.  
   Co., 208 U. S. 208 311, 326,  
   327, 414  
 Pennell v. Philadelphia & R. R.  
   Co., 231 U. S. 675 1268,  
   1340, 1360  
 Pennington v. Grand Trunk  
   Western Ry. Co., 277 Ill. 39  
   542, 580, 598  
 Pennsylvania Co. v. Cole, 131  
   C. C. A. 244, 214 Fed. 948  
   955, 1040, 1041



[REFERENCES ARE TO PAGES]

- Pennsylvania Co. v. Donat, 239  
   U. S. 50 703, 799, 862, 867,  
     873, 880, 1155, 1160  
   v. Donat, 139 C. C. A. 665,  
     224 Fed. 1021 799  
   v. Sheeley, 137 C. C. A. 471,  
     221 Fed. 901 1030, 1040, 1127  
   v. United States, 236 U. S.  
     351 236, 264, 284, 313,  
     318, 335  
   v. United States, 154 C. C.  
     A. 526, 241 Fed. 824 922,  
     1319, 1332, 1338, 1386,  
     1390  
   v. United States, 214 Fed.  
     445 336  
 Pennsylvania R. Co. v. Clark  
   Bros. Coal Min. Co., 238 U. S.  
   456 263, 264, 279, 342, 449,  
     463, 490, 492, 500, 635, 747  
   v. Ewing, 241 Pa. 581 744  
   v. Glas, 152 C. C. A. 244,  
     239 Fed. 256 914, 915, 942  
   v. Goodman, 62 Pa. St. 329 1112  
   v. Goughnour, 126 C. C. A.  
     39, 208 Fed. 961 963, 1026  
   v. Hughes, 191 U. S. 477  
     40, 46, 57, 536, 743  
   v. International Coal Min.  
     Co., 230 U. S. 184 180,  
     304, 321, 343, 436, 438,  
     492, 494, 504  
   v. International Coal Min.  
     Co., 97 C. C. A. 383, 173  
     Fed. 1 312, 358  
   v. Interstate Commerce Com-  
     mission, 193 Fed. 81 342  
   v. Jones, 155 U. S. 333 538  
   v. Knight, 192 U. S. 21 743  
   v. Knight, 58 N. J. L. 287 291  
   v. Knox, 134 C. C. A. 426,  
     218 Fed. 748 764, 767,  
     769, 857, 884  
   v. Mitchell Coal & Coke Co.,  
     238 U. S. 251 761  
   v. Mogi, 71 N. Y. Misc. 412 452  
   v. Olivit Bros., 243 U. S. 574  
     530, 584, 607  
   v. Puritan Coal Min. Co.,  
     237 U. S. 121 342, 343,  
     449, 463, 489, 492, 499,  
     500, 501, 522, 635  
   v. Sonman Shaft Coal Co.,  
     242 U. S. 120 281, 321,  
     343, 489, 492  
   v. Stineman Coal Min. Co.,  
     242 U. S. 298 343, 463  
   v. Titus, 216 N. Y. 17 458,  
     467, 470
- Pennsylvania R. Co. v. Titus, 158  
   N. Y. App. Div. 880 461  
   v. Titus, 156 N. Y. App.  
     Div. 830 467  
   v. Titus, 78 N. Y. Misc. 347  
     458, 467  
   v. Towers, 245 U. S. 6 72  
   v. United States, 154 C. C.  
     A. 526, 241 Fed. 824  
     1310, 1391  
   v. United States, 227 Fed.  
     911 636, 638  
   v. W. F. Jacoby & Co., 242  
     U. S. 89 321, 489, 518  
 Penny v. New Orleans Great  
   Northern R. Co., 135 La. 962  
     722, 1175, 1181, 1204  
 Pensacola Tel. Co. v. Western  
   U. Tel. Co., 96 U. S. 1 9, 16,  
     20, 42, 246  
 Pensacola & A. R. Co. v. State,  
   25 Fla. 310 743  
 People v. Budd, 117 N. Y. 1 744  
   v. Erie R. Co., 198 N. Y. 369 744  
 People ex rel. v. Chicago, I. &  
   L. R. Co., 223 Ill. 581 745  
 People ex rel. Cornell Steam-  
   boat Co. v. Sohmer, 235 U. S.  
   549 17, 18,  
 People ex rel. Stead v. Chi-  
   cago, I. & L. R. Co., 223 Ill.  
   581 744  
 Peoria & P. Union R. Co. v.  
   United States Rolling-Stock  
   Co., 136 Ill. 643 595  
 Perez v. Atehison, T. & S. F.  
   Ry. Co., — Tex. Civ. App. —,  
   192 S. W. 274 792, 793  
   v. Union P. R. Co., — Utah  
     —, 173 Pac. 236 831  
 Perkett v. Manistee & N. E. R.  
   Co., 175 Mich. 253 172, 530, 541  
 Peterson v. Chicago, R. I. & P.  
   R. Co., 205 U. S. 364 550  
 Peyke Bros. Commission Co.  
   v. Sandstone Co-op. Co., 195  
   Mo. App. 417 591  
 Pfeiffer v. Oregon-Washington  
   R. & Nav. Co., 74 Ore. 307  
     1032, 1041, 1122  
 Philadelphia, B. & W. R. Co.  
   v. McConnell, 142 C. C. A.  
     555, 228 Fed. 263 821, 830  
   v. Schubert, 224 U. S.  
     603 395, 758, 1132, 1133  
   v. Tucker, 35 App. Cas. (D.  
     C.) 123 979  
 Philadelphia Fire Ass'n v.  
   People, 119 U. S. 110 10, 12

[REFERENCES ARE TO PAGES]

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Co. v. Gilbert, 245 U. S. 162 1157
- Philadelphia & R. R. Co. v.  
Com., 15 Wall. (U. S.) 232 9, 19
- v. Marland, 152 C. C. A. 51,  
239 Fed. 1 915, 918,  
955, 959, 980, 987, 1065,  
1075, 1088, 1091
- v. United States, 111 C. C.  
A. 661, 191 Fed. 1 1282,  
1323, 1325
- v. Winkler, 4 Pennw.  
(Del.) 387 1265, 1281,  
1307, 1310, 1358
- Philadelphia & Southern S. S.  
Co. v. Pennsylvania, 122 U.  
S. 326 9, 18, 19, 38, 41
- Phillips v. Southern Ry. Co.,  
114 Ga. 284 419
- v. Union Pac. R. Co., 100  
Neb. 157 855, 989, 1017
- Phillips Co. v. Grand Trunk  
Western R. Co., 236 U. S.  
662 320, 450, 515, 525, 1138
- Phoenix Ins. Co. v. Erie & W.  
Transp. Co., 117 U. S. 312 536
- Phoenix Lumber Co. v. Houston  
Water Co., 94 Tex. 456 1211
- Pickard v. Pullman Southern Car  
Co., 117 U. S. 34 15
- Pierce v. Conners, 20 Colo. 178 1095
- Pierce Co. v. Wells, Fargo &  
Co., 236 U. S. 278 80, 170,  
541, 558, 567, 576
- Pierson v. New York, S. & W.  
R. Co., 83 N. J. L. 661 804, 830
- Pinkussohn Cigar Co. v. Clyde  
S. S. Co., 101 S. C. 429 173
- Piper v. Boston & M. R. R., 90  
Vt. 176 576, 608
- Pipes v. Missouri Pac. R. Co.,  
267 Mo. 385 1196
- Pittsburg & S. Coal Co. v.  
Bates, 156 U. S. 577 743
- Pittsburgh, C., C. & St. L. R.  
Co. v. Collard's Adm'r, 170  
Ky. 239 1065, 1074, 1075,  
1098, 1126, 1129, 1130, 1171, 1173
- v. Farmers' Trust & Sav-  
ings Co., 183 Ind. 287  
737, 903, 974, 1006, 1030,  
1196
- v. Glinn, 135 C. C. A. 46,  
219 Fed. 148 799, 876
- v. Hartford City, 170 Ind.  
674 744
- v. Knox, 177 Ind. 344 531, 541
- v. Mitchell, 175 Ind. 196  
171, 531, 532, 595
- Pittsburgh, etc., R. Co. v. State,  
172 Ind. 147 744
- Plass v. Central New England  
Ry. Co., 221 N. Y. 472 727
- Plessy v. Ferguson, 163 U. S.  
537 420
- Plumley v. Com., 155 U. S. 461  
27, 28, 40, 97
- Plummer v. Northern Pac. Ry.  
Co., 152 Fed. 206 1265, 1310
- Pones v. Southern Ry. Co., 236  
Fed. 584 1148
- Poor v. Western U. Tel. Co.,  
196 Mo. App. 557 246, 248, 250
- Popplar v. Minneapolis, St. P.  
& S. S. M. R. Co., 121 Minn.  
413 1274, 1310, 1343, 1404,  
1407, 1410
- Port Richmond & B. P. Ferry  
Co. v. Board Chosen Free-  
holders County of Hudson,  
234 U. S. 317 46, 57, 95, 215
- Portland Railway, Light &  
Power Co. v. Railroad Com-  
mission of Oregon, 229 U.  
S. 397 72
- Portland Terminal Co. v. Jar-  
vis, 141 C. C. A. 562, 227  
Fed. 8 980, 987
- Post & Woodruff v. Atlantic  
Coast Line R. Co., 138 Ga.  
763 171
- Postal Tel. Cable Co. v. Charles-  
ton, 153 U. S. 692 245
- v. Umstadter, 103 Va. 742 100
- Potter v. Kansas City South-  
ern R. Co., 187 Mo. App. 56  
268, 767
- Pound v. Turck, 95 U. S. 459 47
- Prairie Oil & Gas Co. v. Uni-  
ted States, 204 Fed. 798 243
- Pratt v. Ogdensburg & L. C. R.  
Co., 102 Mass. 557 575
- Prentiss v. Atlantic Coast Line  
R. Co., 211 U. S. 210 82
- Prescott & A. C. R. Co. v.  
Atchison, T. & S. F. R. Co.,  
73 Fed. 438 177
- Price v. People, 238 U. S. 446  
16, 20, 25
- Prigg v. Pennsylvania, 16 Pet.  
(U. S.) 539 724, 946
- Primrose v. Western U. Tel.  
Co., 154 U. S. 1 245, 536
- Prize Cases, 2 Black (U. S.)  
635 109
- Proctor & Gamble Co. v. Uni-  
ted States, 225 U. S. 282 442, 450
- Pruitt v. Hannibal & St. J. R.  
Co., 62 Mo. 527 596

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Pryor v. Bishop, 148 C. C. A. 25, 234 Fed. 9 784, 794, 857, 363	Ratterman v. Western U. Tel. Co., 127 U. S. 411 10, 246
Pullman Co. v. Adams, 189 U. S. 420 16	Ray v. Missouri, K. & T. R. Co., 96 Kan. 8 171
v. Linke, 203 Fed. 1017 258, 757	Raymond v. Chicago, M. & St. P. R. Co., 243 U. S. 43 704, 810
v. State ex rel. Coleman, 216 U. S. 56 18, 20, 38, 42, 451	v. Chicago, M. & St. P. R. Co., 147 C. C. A. 245, 233 Fed. 239 810
Pullman Palace Car Co. v. Lawrence, 74 Miss. 782 929, 1267	Read v. Spaulding, 30 N. Y. 630 596
Puritan Coal Min. Co. v. Pennsylvania R. Co., 237 Pa. 420 499	Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362 70, 72, 73, 157
Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192 20, 25	v. Mercantile Trust Co., 154 U. S. 418 72
Pyles v. Atchison, T. & S. F. R. Co., 97 Kan. 455 956, 1039	Reardon v. Balaklala Consol. Copper Co., 193 Fed. 189 1215
R.	Rearick v. Com., 203 U. S. 507 13, 21, 747
Radezky v. Sargent & Co., 77 Conn. 110 1142	Reed v. Western U. Tel. Co., 56 Mo. App. 168 246
Ragan v. Aiken & Buffet, 9 Lea (Tenn.) 609 305	Reese v. Philadelphia & R. R. Co., 239 U. S. 463 915
Rahrer, In re, 140 U. S. 545 14, 22, 51	Reeve v. Northern Pac. R. Co., 82 Wash. 268 937
Railroad Commission of Louisi- ana v. Texas & P. R. Co., 229 U. S. 336 44, 208, 263, 267, 279, 282, 760, 762, 770, 772, 1301	Reid v. Colorado, 187 U. S. 137 14, 25, 28, 56, 57, 93
Railroad Commission of Ohio v. Worthington, 225 U. S. 101 38, 43, 44, 75, 208, 263, 266, 270, 273, 762, 770	Renlund v. Commodore Min. Co., 89 Minn. 41 1055
Railroad Com'rs v. Western U. Tel. Co., 113 N. C. 213 248, 766	Renn v. Seaboard Air Line R. Co., 170 N. C. 128 734, 915, 1147, 1181
Raines v. Southern R. Co., 169 N. C. 189 1064, 1065, 1074, 1075	Reynolds v. St. Louis South- western R. Co., 195 Mo. App. 215 278, 761, 770
Raleigh & G. R. Co. v. Swan- son, 102 Ga. 754 457, 467	Rhoads v. Chicago & A. R. Co., 227 Ill. 328 1094
Randall v. Richmond & D. R. Co., 108 N. C. 612 369	Rhodes v. Chicago, R. I. & P. Ry. Co., — Iowa —, 161 N. W. 652 942
Ransom v. New York, C. & St. L. R. Co., 93 Ohio St. 223 1054	v. State, 170 U. S. 412 17, 22, 32, 294
Rasmussen v. State, 181 U. S. 198 25	Rice v. Boston & M. R. R., 203 Fed. 580 1149, 1150
Rasmussen v. United States, 197 U. S. 516 1237	Rich v. St. Louis & S. F. R. Co., 166 Mo. App. 379 694, 722, 731, 855, 860, 874, 892, 1171, 1173, 1182
Ratcliff v. Wichita Union Stock- yards Co., 74 Kan. 1 744	Richardson v. Detroit & M. R. Co., 182 Mich. 206 916
Rather & Co. v. Nashville, C. & St. L. R. Co., 131 Tenn. 289 173, 453	Richelieu v. Union Pac. R. Co., 97 Neb. 360 1103
Ratican v. Terminal R. R. Ass'n of St. Louis, 114 Fed. 666 523	Richmond v. Chicago & W. M. Ry. Co., 87 Mich. 374 1095
	v. Southern Bell Telephone & Telegraph Co., 174 U. S. 761 42, 245

[REFERENCES ARE TO PAGES]

Richmond & A. R. Co. v. R. A. Patterson Tobacco Co., 169 U. S. 311	537	Root v. Kansas City Southern R. Co., 195 Mo. 348	929, 1267
Richmond & D. R. Co. v. Elliott, 149 U. S. 266	1075	Rosenberger v. Pacific Exp. Co., 241 U. S. 48	16, 20, 24, 32
Rickerd v. Chicago, St. P., M. & O. R. Co., 73 C. C. A. 139, 141 Fed. 905	928	Rosney v. Erie R. Co., 68 C. C. A. 155, 135 Fed. 311	1332
Ridge v. Norfolk Southern R. Co., 167 N. C. 510	953, 963	Ross v. Maine Cent. R. Co., 112 Me. 63	172, 530, 565
Rief v. Great Northern R. Co., 126 Minn. 430	937	v. St. Louis & S. F. R. Co., 93 Kan. 517	1042, 1048
Ringwalt v. Wabash R. Co., 45 Neb. 760	291	v. Sheldon, 176 Iowa 618	719, 745, 746, 753, 783, 810, 814, 1204
Rio Grande Southern R. Co. v. Campbell, 44 Colo. 1	743, 1287, 1351	v. Troy & B. R. Co., 49 Vt. 364	575
Rivers v. Kansas City, M. & B. R. Co., 86 Miss. 571	420	Rossi v. Com., 238 U. S. 62	16, 20
Robb v. Connolly, 111 U. S. 624	1416	Rothschild v. Wabash, St. L. & P. Ry. Co., 92 Mo. 91	328
Robbins v. Shelby County Taxing Dist., 120 U. S. 489	9, 10, 11, 18, 19, 33, 42	Rounsaville v. Central R. Co., 87 N. J. L. 371	58, 727
Roberts v. Cleveland, C., C. & St. L. R. Co., 279 Ill. 493	1030	v. Central R. of New Jersey, — N. J. L. —, 101 Atl. 182	722, 732
v. Nashville, C. & St. L. R. Co., 135 Tenn. 48	453, 456, 458	Rowlands v. Chicago & N. W. R. Co., 149 Wis. 51	856, 1196, 1199
Robie v. Boston & M. R. R., — Vt. —, 100 Atl. 925	723, 737, 822, 917, 932, 934, 956, 981, 990, 1017	Royer v. Pennsylvania R. Co., — Pa. —, 103 Atl. 276	737
Robinson v. Baltimore & O. R. Co., 237 U. S. 84	729, 757, 1131, 1135	Royster Guano v. Cole, 115 Me. 387	10
v. Baltimore & O. R. Co., 222 U. S. 506	463, 464	Ruck v. Chicago, M. & St. P. R. Co., 153 Wis. 153	704, 732, 776, 848
v. Baltimore & O. R. Co., 40 App. Cas. (D. C.) 169	909	Ruel v. Wisconsin Northwestern Ry. Co., — Wis. —, 163 N. W. 189	856, 981, 990
v. Baltimore & O. R. Co., 64 W. Va. 406	493, 499, 523	Ruggles v. People, 108 U. S. 526	70
v. Louisville & N. R. Co., 160 Ky. 235	172, 438, 452, 461	Runyan v. Central R. Co. of New Jersey, 61 N. J. L. 537	291
Rodell v. Relief Department of Chicago, B. & Q. R. Co., 118 Minn. 449	1132	Ruppell v. New York Cent. R. Co., 171 N. Y. App. Div. 832	874, 891
Rodgers v. New York Cent. & H. River R. Co., 171 N. Y. App. Div. 385	718, 723, 822, 1208	Rush v. Southern Ry. Co., — Ga. App. —, 91 S. E. 898	916, 1180
Roebuck v. Atchison, T. & S. F. Ry. Co., 99 Kan. 544	916, 932, 934, 939, 977	Russell v. Erie R. Co., 177 N. Y. App. Div. 13	723
Rogers v. New York Cent. & H. River R. Co., — N. Y. App. Div. —, 157 N. Y. Supp. 83	1181	Rutter v. Missouri Pac. Ry. Co., 81 Mo. 169	1142
v. State, 227 U. S. 401	12		
v. United States, 141 U. S. 548	518	Saar v. Atchison, T. & S. F. R. Co., 97 Kan. 441	854, 1030
		Sage v. Evansville & T. H. R. Co., 134 Ind. 100	419
		Saick v. Pennsylvania R. Co., 193 Fed. 303	1148
		St. Clair v. Cox, 106 U. S. 350	550

[REFERENCES ARE TO PAGES]

- St. Clair County v. Interstate  
 Sand & Car Transfer Co., 192  
 U. S. 454 214, 216  
 St. Joseph Stockyards Co. v.  
 United States, 110 C. C. A.  
 432, 187 Fed. 104 745, 1293, 1490  
 St. Joseph & G. I. R. Co. v. Des  
 Moines Union Ry. Co., —  
 Iowa —, 162 N. W. 812 552  
 v. Moore, 243 U. S. 311  
 1309, 1312, 1368  
 v. United States, 146 C. C.  
 A. 397, 232 Fed. 349  
 763, 821, 1435  
 St. Louis v. Western U. Tel.  
 Co., 148 U. S. 92 16, 42, 245  
 St. Louis, A. & T. Ry. Co. v.  
 Neel, 56 Ark. 279 582  
 St. Louis Drayage Co. v. Louis-  
 ville & N. R. Co., 65 Fed. 39  
 177, 339  
 St. Louis, I. M. & S. R. Co. v.  
 Birch, 89 Ark. 424 989  
 v. Coke, 118 Ark. 49 857,  
 1180, 1204  
 v. Commercial Union Ins.  
 Co., 139 U. S. 223 596  
 v. Conley, 110 C. C. A. 97,  
 187 Fed. 949 856, 1131, 1146  
 v. Craft, 237 U. S. 648  
 721, 777, 1066, 1068,  
 1073, 1074, 1092, 1125  
 v. Cunningham Commission  
 Co., 125 Ark. 577 530,  
 542, 595  
 v. Edwards, 227 U. S. 265  
 75, 77, 886, 1280  
 v. Faulkner, 111 Ark. 430  
 456, 461, 542  
 v. Hesterly, 228 U. S. 702  
 721, 1071, 1163, 1171, 1175  
 v. Hesterly, 98 Ark. 240  
 1180, 1195, 1197  
 v. Home Oil & Manu-  
 facturing Co., 122 Ark.  
 200 594  
 v. Howard, 124 Ark. 588  
 915, 988  
 v. Ingram, 124 Ark. 298  
 914, 915, 947  
 v. McWhirter, 229 U. S.  
 265 732, 930, 934, 944,  
 1161, 1162, 1220, 1326,  
 1345, 1447  
 v. Neal, 83 Ark. 591 1321  
 v. Needham, 16 C. C. A.  
 457, 69 Fed. 823 946  
 v. Rodgers, 118 Ark. 263  
 1006, 1030, 1042, 1063,  
 1089, 1129  
 v. Sharp, 115 Ark. 308  
 843, 1187
- St. Louis, etc., R. Co. v. Spriggs,  
 113 Ark. 118 267, 767  
 v. Starbird, 243 U. S. 592  
 530, 539, 541, 545, 547,  
 559, 563, 569  
 v. State, 240 U. S. 518 45,  
 94, 99, 100  
 v. Steel, 129 Ark. 520 915,  
 936, 948  
 v. Stewart, 124 Ark. 437  
 854, 915, 959  
 v. Taylor, 210 U. S. 281  
 923, 934, 1155, 1160,  
 1162, 1280, 1319, 1321,  
 1338, 1352, 1368, 1378, 1383  
 v. United States, 217 Fed.  
 80 385, 648  
 v. West Bros., — Tex. Civ.  
 App. —, 159 S. W. 142 456  
 v. Wolf, 100 Ark. 22 467  
 v. York, 92 Ark. 554 1410  
 St. Louis, K. C. & C. R. Co. v.  
 Conway, 86 C. C. A. 1, 156  
 Fed. 234 944  
 St. Louis, M. & S. E. R. Co. v.  
 Garner, 76 Ark. 555 1094  
 St. Louis Merchants' Bridge  
 Terminal R. Co. v. Schuer-  
 man, 150 C. C. A. 203, 237  
 Fed. 1 721, 922, 955, 1007,  
 1009, 1031, 1049  
 St. Louis, S. F. & T. R. Co. v.  
 Geer, — Tex. Civ. App. —,  
 149 S. W. 1178 1054, 1090  
 v. Seale, 229 U. S. 156 725,  
 763, 777, 789, 871, 903,  
 1064, 1164, 1171, 1180,  
 1204, 1205, 1212  
 v. Seale, — Tex. Civ. App.  
 —, 160 S. W. 317 1215  
 v. Smith, — Tex. Civ. App.  
 —, 171 S. W. 512 1215, 1218  
 St. Louis Southwestern R. Co.  
 v. Anderson, 117 Ark. 41  
 763, 860, 881, 1042, 1049, 1405  
 v. Brothers, — Tex. Civ.  
 App. —, 165 S. W. 488  
 725, 789, 1171, 1173, 1176  
 v. Burekett, 229 U. S. 603  
 451, 470  
 v. Harvey, 75 C. C. A. 536,  
 144 Fed. 806 784  
 v. J. S. Patterson Const.  
 Co., 181 Ind. 304 451, 463  
 v. State, 235 U. S. 350 17,  
 18, 42  
 v. State, 217 U. S. 136 40  
 v. United States, 245 U. S.  
 136 644

[REFERENCES ARE TO PAGES]

St. Louis Southwestern R. Co. v. United States, 106 C. C. A. 136, 183 Fed. 770 843, 1425 v. United States, 234 Fed. 668 450, 644	St. Louis, etc., R. Co. v. Walton- Chandler Lumber Co., 44 Okla. 452 468 v. Wood, — Okla. —, 152 Pac. 848 173 v. Woodruff Mills, 105 Miss. 214 81, 543, 547 v. Wynn, — Okla. —, 156 Pac. 346 173 v. Wynn, — Okla. —, 153 Pac. 1156 543 v. Zalondek, 28 Okla. 746 78 v. Zickafoose, 39 Okla. 302 — 173, 530, 543, 570, 574
St. Louis Southwestern R. Co. of Texas v. Alexander, 227 U. S. 218 540, 551 v. Arkansas & T. Grain Co., 42 Tex. Civ. App. 125 762 v. Huey, 61 Tex. Civ. App. 605 1095 v. Lewellen Bros., 113 C. C. A. 414, 192 Fed. 540 477 v. Smitha, — Tex. Civ. App. —, 190 S. W. 237 1171, 1176, 1178 v. Spring River Stone Co., 169 Mo. App. 109 439	Salabrin v. Ann Arbor R. Co., 194 Mich. 458 785, 790, 822, 832, 942 Salmon v. Southern R. Co., 133 Tenn. 223 703, 838 Sams v. St. Louis & M. R. Co., 174 Mo. 53 231 San Antonio & A. P. Ry. Co. v. Littleton, — Tex. Civ. App. —, 180 S. W. 1194 705, 1194, 1196, 1197 v. Long, 87 Tex. 148 1095 v. Wagner, 241 U. S. 476 800, 922, 923, 1154, 1270, 1307, 1308, 1309, 1320, 1340, 1342, 1351 v. Wagner, — Tex. Civ. App. —, 166 S. W. 24 1307, 1311, 1344, 1358
St. Louis & S. F. R. Co. v. Akard, — Okla. —, 159 Pac. 344 173, 543 v. Bilby, 35 Okla. 589 544, 545 v. Brown, 241 U. S. 233 1045 v. Brown, 45 Okla. 143 734, 874, 1181 v. Clappitt, — Okla. —, 154 Pac. 40 1130 v. Conarty, 238 U. S. 243 942, 1155, 1308, 1318, 1340, 1345, 1347 v. Conarty, 106 Ark. 421 763, 844, 1073, 1149, 1302, 1310, 1343 v. Cox, Peery & Murray, 40 Okla. 258 173, 531, 543 v. Delk, 86 C. C. A. 95, 158 Fed. 931 1319 v. Duke, 112 C. C. A. 564, 192 Fed. 306 1090 v. Gill, 156 U. S. 649 41, 69, 70, 72, 73, 157 v. Heyser, 95 Ark. 412 171, 532 v. Keller, 90 Ark. 308 559 v. Loughmiller, 193 Fed. 689 1210 v. Mounts, 44 Okla. 359 173, 531 v. Ostrander, 66 Ark. 567 457 v. Pickens, — Okla. —, 151 Pac. 1055 458, 461, 463, 570 v. Snowden, 48 Okla. 115 724, 942, 1010, 1196, 1197 v. State, 87 Ark. 562 267, 767 v. State, 27 Okla. 424 78 v. United States, 94 C. C. A. 437, 169 Fed. 69 1490	Sanders v. Charleston & W. C. Ry. Co., 97 S. C. 50 786, 793 Sanderson v. Boston & M. R. R., — Vt. —, 101 Atl. 40 917 Sandidge v. Atchison, T. & S. F. R. Co., 113 C. C. A. 653, 193 Fed. 867 979, 1040 San Diego Land & Town Co. v. City of National City, 174 U. S. 739 69 v. Jasper, 189 U. S. 439 69, 73 Sands v. Manistee River Im- provement Co., 123 U. S. 288 45 Sanford v. Catawissa, W. & E. R. Co., 24 Pa. St. 378 304 v. Sanford, 62 N. Y. 553 1142 San Jose Land & Water Co. v. San Jose Ranch Co., 189 U. S. 177 1163 San Pedro, L. A. & S. L. R. Co. v. Davide, 127 C. C. A. 454, 210 Fed. 870 737, 784, 786, 821, 823, 963 v. United States, 136 C. C. A. 343, 220 Fed. 737 1447, 1455, 1471, 1478

[REFERENCES ARE TO PAGES]

- San Pedro, etc., R. Co. v. United States, 130 C. C. A. 28, 213  
Fed. 326 1435, 1443, 1446,  
1448, 1449, 1459
- Santa Fe Cent. R. Co. v. Friday, 232 U. S. 694 758
- Santa Fe, P. & P. R. Co. v. Grant Bros. Const. Co., 228 U. S. 177 361, 436, 438, 483
- Sargent v. Boston & L. R. Co., 115 Mass. 416 305
- Sault Ste. Marie, City of v. International Transit Co., 234 U. S. 333 14, 18, 44, 57, 215
- Saunders v. Atlantic Coast Line R. Co., 101 S. C. 11 453  
v. Southern R. Co., 62 C. C. A. 523, 128 Fed. 15 290  
v. Southern R. Co., 167 N. C. 375 776
- Savage v. Jones, 225 U. S. 501  
24, 26, 27, 39, 45, 55, 57, 463, 1280
- Savannah, F. & W. Ry. Co. v. Bundick, 94 Ga. 775 316, 451, 457  
v. Harris, 26 Fla. 148 538, 600
- Savannah & N. W. Ry. Co. v. Roach, 19 Ga. App. 388 784, 1187, 1194
- Savitz v. Ohio & M. R. Co., 150 Ill. 208 328
- Saxon v. Erie R. Co., 221 N. Y. 179 776
- Saxon Mills v. New York, N. H. & H. R. Co., 214 Mass. 383 172
- Schaeffer v. Illinois Cent. R. Co., 172 Ky. 337 703, 705, 718, 775, 1184
- Schaub v. Hannibal & St. J. R. Co., 106 Mo. 74 1112
- Scheffer v. Washington City, V. M. & G. S. R. Co., 105 U. S. 249 945
- Schenberger v. Union Pac. R. Co., 84 Kan. 79 452, 467, 469
- Schlemmer v. Buffalo, R. & P. R. Co., 220 U. S. 590 987, 992, 1007, 1352, 1401, 1403, 1404, 1407  
v. Buffalo, R. & P. R. Co., 205 U. S. 1 690, 1013, 1025, 1265, 1281, 1352, 1391, 1401, 1407, 1420
- Schnatz v. Philadelphia & R. R. Co., 160 Pa. St. 602 1095
- Schollenberger v. Com., 171 U. S. 1 21, 38
- Schultz v. Skaneateles R. Co., 122 N. Y. Supp. 445 543
- Schweitz v. Chicago, M. & St. P. R. Co., 132 C. C. A. 660, 216 Fed. 750 1009, 1012, 1023, 1435  
v. Chicago, M. & St. P. Ry. Co., 205 Fed. 96 1326
- Seofield v. Lake Shore & M. S. Ry. Co., 43 Ohio St. 571 304, 327, 328
- Scott v. Neely, 140 U. S. 106 518
- Seaboard Air Line Ry. v. Blackwell, 244 U. S. 310 89  
v. Duvall, 225 U. S. 477 1155, 1160, 1162, 1182, 1199  
v. Hess, — Fla. —, 74 So. 500 722, 854, 937, 1144, 1196, 1204  
v. Horton, 239 U. S. 595 854, 987, 988, 993, 994, 1155  
v. Horton, 233 U. S. 492 60, 138, 721, 725, 732, 737, 918, 930, 950, 980, 986, 987, 991, 994, 1008, 1011, 1016, 1020, 1025, 1029, 1049, 1320, 1405
- v. Kenney, 240 U. S. 489 721, 777, 1053, 1056, 1058, 1060, 1154
- v. Koennecke, 239 U. S. 352 728, 873, 1093, 1160, 1162, 1169, 1180, 1200, 1201
- v. Lorick, 243 U. S. 572 992
- v. Luke, 19 Ga. App. 100 467
- v. McMichael, 143 Ga. 689 784, 854
- v. Moore, 228 U. S. 433 735, 763, 919, 1013, 1051
- v. Mullin, 70 Fla. 450 529, 574, 596, 597
- v. Padgett, 236 U. S. 668 792, 860, 934, 980, 987, 1160, 1162, 1169
- v. Patrick, 10 Ala. App. 341 451
- v. Railroad Commission of Georgia, 240 U. S. 324 68, 91
- v. Renn, 241 U. S. 290 731, 1138, 1154, 1180, 1210, 1212, 1215
- v. State, 245 U. S. 298 32
- v. State ex rel. Ellis, 203 U. S. 261 70
- v. Thornton, 238 U. S. 606 721, 1155

[REFERENCES ARE TO PAGES]

Seaboard Air Line Ry. v. Tilghman, 237 U. S. 499	1030,	
1031, 1033, 1042, 1048,	1155	
Sears v. Atlantic Coast Line R. Co., 169 N. C. 446	855,	
861, 870, 874, 974, 1010, 1401,	1405	
v. Warren, 36 Ind. 267	744	
Seawell v. Kansas City, Ft. S. & M. R. Co., 119 Mo. 222	766,	1299
Second Employers' Liability Cases, In re; 223 U. S. 1	15,	
46, 50, 690, 695, 704, 719,	721, 740, 777, 804, 1147,	
1188, 1285,	1417	
Security State Bank v. Simmons, 251 Mo. 2	59	
Selleck v. Lake Shore & M. S. Ry. Co., 93 Mich. 375	596	
Sells v. Atchison, T. & S. F. R. Co., 266 Mo. 155	703,	
722, 733, 822, 1171, 1173,	1180, 1204	
Seward v. Vera Cruz, L. R. 10 App. Cas. 59	1111	
Shade v. Northern Pac. Ry. Co., 206 Fed. 353	739, 741,	
1180, 1182		
Shanahan v. Coburn, 128 Mich. 692	1240	
Shanks v. Delaware, L. & W. R. Co., 239 U. S. 556	703,	
704, 719, 777, 780, 782, 827,	828, 835, 836, 837, 851, 1155	
v. Delaware, L. & W. R. Co., 214 N. Y. 413	703, 776	
v. Delaware, L. & W. R. Co., 163 N. Y. App. Div. 565	776, 822	
Shanley v. Philadelphia & R. R. Co., 221 Fed. 1012	854,	
857, 873, 881, 1034, 1042		
Shannon v. Boston & M. R. R., 77 N. H. 349	722, 1137	
Shay v. Union Pac. R. Co., 47 Utah 252	532	
Sheldon v. Wabash R. Co., 105 Fed. 785	499, 522	
Shellabarger Elevator Co. v. Illinois Cent. R. Co., 278 Ill. 333	542	
Shepherd v. Southern Pine Co., 118 Ga. 292	1211	
Sherlock v. Alling, 93 U. S. 99	26, 93, 97, 690, 743	
Shewalter v. Carolina, C. & O. R. Co., 239 U. S. 630	1072	
Shohoney v. Quincy, O. & K. C. R. Co., 223 Mo. 649	1307, 1344	
Shugart v. Atlanta, K. & N. Ry. Co., 66 C. C. A. 379,	133	
Fed. 505	945	
Shultz v. Skaneateles R. Co., 145 N. Y. App. Div. 906	173	
v. Skaneateles R. Co., 122 N. Y. Supp. 445	530	
Sicard v. Davis, 6 Pet. (U. S.) 124	1210, 1215	
Sieber v. Great Northern Ry. Co., 76 Minn. 269	1095	
Siebold, Ex parte, 100 U. S. 371	1416	
Siegel v. New York Cent. & H. River R. Co., 178 Fed. 873	1318, 1323	
Siggins v. Chicago & N. W. R. Co., 153 Wis. 122	498, 500, 523	
Silkman v. Board of Water Com'rs of City of Yonkers, 152 N. Y. 327	328	
Simmons v. Fish, 210 Mass. 563	1245	
Simpson v. Dufour, 126 Ind. 322	575	
v. Shepard, 230 U. S. 352	38, 40, 69, 72, 73, 450, 742	
Sims v. Minneapolis, St. P. & S. S. M. Ry. Co., — Mich. —, 162 N. W. 988	981, 989	
v. Missouri Pac. R. Co., 177 Mo. App. 18	172, 559	
Singer Sewing Machine Co. v. Brickell, 233 U. S. 304	11	
Sinnot v. Davenport, 22 How. (U. S.) 227	743	
Sioux Remedy Co. v. Cope, 235 U. S. 197	17, 43	
Skaggs v. Illinois Cent. R. Co., 124 Minn. 503	967	
Slater v. Mexican Nat. R. Co., 194 U. S. 120	1138	
Slaughter House Cases, 16 Wall. (U. S.) 36	743	
Sligh v. Kirkwood, 237 U. S. 52	25, 27, 45	
Slocum v. New York Life Ins. Co., 228 U. S. 364	1246	
Sloop v. Delano, 182 Mo. App. 299	461, 467, 470	
Smeltzer v. St. Louis & S. F. R. Co., 158 Fed. 649	540	
Smiegil v. Great Northern R. Co., 165 Wis. 57	704, 732, 844, 849, 981, 988, 990, 1010, 1402	
Smith v. Alabama, 124 U. S. 465	15, 46, 57, 93, 97, 99, 690	
v. Atlantic Coast Line R. Co., 127 C. C. A. 311,	210 Fed. 761	955, 1307, 1322



## [REFERENCES ARE TO PAGES]

Smith v. Boese, 39 Mo. App. 15	1215	Sorenson v. Northern Pac. R. Co., 53 Mont. 268	822, 956, 959, 981, 989, 1010
v. Chicago & N. W. Ry. Co., 49 Wis. 443	304	South Covington & C. St. R. Co. v. City of Covington, 235 U. S. 537	17, 20, 37, 43, 46, 227, 265, 770
v. Detroit & T. S. L. R. Co., 175 Fed. 506	1195	v. Finan's Adm'x, 153 Ky. 340	919, 932, 946, 969, 1231
v. Great Northern R. Co., 15 N. D. 195	440, 458	Southern Cotton Oil Co. v. Central of Georgia R. Co., 142 C. C. A. 627, 228 Fed. 335	443
v. Gulf, C. & S. F. R. Co., 177 Mo. App. 269	768	Southern Exp. Co. v. Ashford, 126 Ala. 591	575
v. Illinois Cent. R. Co., 119 C. C. A. 33, 200 Fed. 553	942	v. Byers, 240 U. S. 612	59, 60, 138, 170, 529, 541, 597, 933, 950
v. Industrial Acc. Commission of California, 26 Cal. App. 560	58, 706, 727, 902	v. Caldwell, 21 Wall. (U. S.) 264	559
v. Interstate Commerce Commission, 245 U. S. —, 62 L. Ed. —, 38 Sup. Ct. 30	668	v. Essig Bros., 17 Ga. App. 657	171
v. Lisher, 23 Ind. 500	1050	v. Meyer, 94 Ark. 103	541
v. Lusk, — Mo. App. —, 198 S. W. 434	729	v. Oliver, — Ga. App. —, 93 S. E. 109	542
v. Maryland, 18 How. (U. S.) 71	743	v. State, 188 Ala. 454	33
v. Missouri Pac. Ry. Co., 5 C. C. A. 557, 56 Fed. 458	1215	Southern Indiana Exp. Co. v. United States Exp. Co., 35 C. C. A. 172, 92 Fed. 1022	369
v. Northern Pac. R. Co., 79 Wash. 448	815, 964, 1181	v. United States Exp. Co., 88 Fed. 659	256, 758
v. Pennsylvania R. Co., 151 C. C. A. 277, 239 Fed. 103	915, 926, 952	Southern Nursery Co. v. Winfield Nursery Co., 89 Kan. 522	171
v. Pryor, 195 Mo. App. 259	785, 1053, 1064, 1074, 1102, 1104, 1107, 1111	Southern Pac. Co. v. Allen, 48 Tex. Civ. App. 66	1266, 1402
v. St. Louis & S. F. R. Co., 95 Kan. 451	854, 916, 989, 1030	v. Campbell, 230 U. S. 537	69
v. St. Louis & S. W. Ry. Co., 181 U. S. 248	25	v. Campbell, 189 Fed. 696	285
v. State, 233 U. S. 630	100	v. Crenshaw, 5 Ga. App. 675	79, 171, 530
Smithson v. Atchison, T. & S. F. R. Co., 174 Cal. 148	722, 724, 725, 731, 951, 1030, 1032, 1049, 1075, 1405	v. Darnell-Taenzer Lumber Co., 245 U. S. 531	508
Smullen v. Phillips, 92 Cal. 408	1215	v. Da Valle Da Costa, 111 C. C. A. 417, 190 Fed. 689	1176
Smyth v. Ames, 171 U. S. 361	72	v. Frye & Bruhn, 82 Wash. 9	456, 468, 470
v. Ames, 169 U. S. 466	41, 69, 70, 72, 73	v. Industrial Accident Commission, — Cal. —, 171 Pac. 1071	910
Snead v. Central of Georgia Ry. Co., 151 Fed. 608	708	v. Industrial Accident Commission of California, 174 Cal. 19	753, 852
Snow v. Alley, 156 Mass. 193	1240	v. Industrial Accident Commission of California, 174 Cal. 8	775, 821, 832, 903, 974
Snyder v. Great Northern R. Co., 88 Wash. 49	784, 842, 874, 917, 1043	v. Interstate Commerce Commission, 219 U. S. 433	181
Sonman Shaft Coal Co. v. Pennsylvania R. Co., 241 Pa. 487	280		

[REFERENCES ARE TO PAGES]

- Southern Pac. Co. v. Interstate  
 Commerce Commission, 200  
 U. S. 536 168, 177, 337, 538  
 v. Jensen, 244 U. S. 205  
     731, 776, 946  
 v. Pillsbury, 170 Cal. 782  
     731, 844  
 v. Schuyler, 227 U. S. 601  
     39, 1160  
 v. Seley, 152 U. S. 145 1252  
 v. State, — Ariz. —, 165  
     Pac. 303 761, 767  
 v. United States, 137 C. C.  
     A. 584, 222 Fed. 46  
     1447, 1448  
 v. Vaughn, — Tex. Civ.  
     App. —, 165 S. W. 885  
     783, 798, 855, 1224, 1228  
 v. Yeargin, 48 C. C. A.  
     497, 109 Fed. 436 1327  
 Southern Pac. R. Co. v. A. J.  
 Lyon & Co., 107 Miss. 777  
     172, 531, 541, 588  
 v. W. T. Meadors & Co.,  
     104 Tex. 469 174  
 Southern Pac. Terminal Co.  
 v. Interstate Commerce  
 Commission, 219 U. S. 498  
     82, 202, 235, 237, 263, 265,  
     272, 295, 351, 761, 770, 886  
 Southern R. Co. v. Ansley, 8  
 Ga. App. 325 1195, 1196, 1208  
 v. Avey, 173 Ky. 598 543, 580  
 v. Bennett, 17 Ga. App.  
     162 539, 580, 598  
 v. Blackwell, — Ga. App.  
     —, 93 S. E. 321 916,  
     943, 980, 1009, 1030  
 v. Burlington Lumber Co.,  
     225 U. S. 99 39, 283  
 v. Carson, 194 U. S. 136 1307  
 v. Crockett, 234 U. S. 725  
     801, 980, 1010, 1048,  
     1287, 1352, 1380, 1401  
 v. Derr, 153 C. C. A. 109,  
     240 Fed. 73 952  
 v. Fisher, — Ala. —, 74 So.  
     580 718, 860, 866, 904,  
     980, 988, 1030, 1031,  
     1034, 1042  
 v. Gadd, 233 U. S. 572  
     854, 987  
 v. Gray, 241 U. S. 333 60,  
     138, 731, 733, 854, 914,  
     915, 933, 949, 986, 987,  
     994, 1154, 1160  
 v. Harrison, 119 Ala. 539  
     438, 451, 457, 461
- Southern R. Co. v. Hill, 139 Ga.  
     549 1030, 1032, 1039, 1063,  
     1074, 1075, 1092  
 v. Howerton, 182 Ind. 208  
     722, 737, 821, 827, 834,  
     916, 1146, 1180, 1189,  
     1190, 1243  
 v. Jacobs, 116 Va. 189 861,  
     867, 870, 874, 966, 985, 1012  
 v. King, 217 U. S. 524 86  
 v. Lloyd, 239 U. S. 496 762,  
     777, 807, 854, 860, 1146,  
     1148, 1155, 1163  
 v. McGuin, 153 C. C. A. 447,  
     240 Fed. 649 826, 854  
 v. Maryland, 152 C. C. A.  
     91, 239 Fed. 41 955  
 v. Mays, 152 C. C. A. 91,  
     239 Fed. 41 959, 980,  
     1007, 1030, 1032, 1039  
 v. Murphy, 9 Ga. App. 190  
     705, 858, 859  
 v. North State Cotton Co.,  
     107 Miss. 71 81, 547  
 v. Peters, 194 Ala. 94 722,  
     775, 807, 860, 901, 955,  
     959, 1006, 1009, 1030,  
     1039, 1042, 1180, 1196  
 v. Prescott, 240 U. S. 632  
     59, 60, 138, 170, 300, 444,  
     455, 460, 529, 539, 541,  
     547, 586, 592, 593, 597,  
     933, 934, 950, 986  
 v. Puckett, 244 U. S. 571  
     825, 880  
 v. Puckett, 16 Ga. App. 551  
     821, 1149  
 v. Railroad Commission of  
     Indiana, 236 U. S. 439  
     39, 45, 48, 58, 98, 800,  
     1270, 1274, 1279, 1287  
 v. Railroad Commission of  
     Indiana, 179 Ind. 23  
     744, 1363  
 v. Reid, 222 U. S. 424 39,  
     55, 56, 75, 76, 155, 283,  
     301, 582, 742, 886  
 v. Reid & Beam, 222 U. S.  
     444 283  
 v. Rhoda, — Fla. —, 74 So.  
     19 705  
 v. St. Louis Hay & Grain  
     Co., 214 U. S. 297 235, 356  
 v. St. Louis Hay & Grain  
     Co., 82 C. C. A. 614, 153  
     Fed. 728 356  
 v. Savage, 18 Ga. App. 489  
     171, 598

[REFERENCES ARE TO PAGES]

Southern R. Co. v. Simmons, 105 Va. 651	1344, 1358
v. Smith, 131 C. C. A. 238, 214 Fed. 942	1031
v. Smith, 123 C. C. A. 488, 205 Fed. 360	966, 1129, 1244
v. Snyder, 124 C. C. A. 60, 205 Fed. 868	1398
v. Snyder, 109 C. C. A. 344, 187 Fed. 492	842, 1265, 1266, 1281, 1288, 1300, 1398
v. United States, 222 U. S. 20 15, 39, 52, 54, 690, 691, 801, 1271, 1274, 1277, 1287, 1288, 1351, 1352	
v. Vessell, 192 Ala. 440	1105, 1107
v. Waxelbaum Produce Co., 19 Ga. App. 64	171
v. Wilcox, 99 Va. 394	453, 456, 458
v. Wilmont Oil Mills, 105 S. C. 51	452, 477
Southern Ry.—Carolina Division v. Bennett, 233 U. S. 80	734, 951, 1167, 1229, 1244
Southern Wire Co. v. St. Louis Bridge & Tunnel R. Co., 38 Mo. App. 191	317, 452
Southwestern Brewery & Ice Co. v. Schmidt, 226 U. S. 162	992
Spada v. Pennsylvania R. Co., 86 N. J. L. 187	81, 172, 452, 539, 570, 607
Spence v. Southern Ry. Co., 101 S. C. 436	173, 544, 547
Spies v. State, 123 U. S. 131	1159
Spinden v. Atchison, T. & S. F. R. Co., 95 Kan. 474	814, 822, 914, 980, 989, 1007
Spoffard v. Boston & M. R. Co., 128 Mass. 326	305
Spokane & I. E. R. Co. v. Campbell, 241 U. S. 497	723, 752, 800, 922, 936, 1048, 1296, 1298, 1322, 1333, 1338, 1405
v. Campbell, 133 C. C. A. 370, 217 Fed. 518	956, 1041, 1332
v. United States, 241 U. S. 344	752, 1278, 1281, 1296, 1396, 1397
Stafford v. Norfolk & W. R. Co., 202 Fed. 605	1180
Staley v. Illinois Cent. R. Co., 268 Ill. 356	58, 724, 727, 744, 785, 842, 844
Standard Combed Thread Co. v. Pennsylvania R. Co., 88 N. J. L. 257	172, 582
Standard Light & Power Co. v. Muncey, 33 Tex. Civ. App. 416	1095
Standard Milling Co. v. White Line Cent. Transit Co., 122 Mo. 258	593
Standard Oil Co. of Indiana v. United States, 90 C. C. A. 364, 164 Fed. 376	437
Standard Oil Co. of Kentucky v. State ex rel. Cates, 217 U. S. 413	40
Standard Oil Co. of New York v. United States, 103 C. C. A. 172, 179 Fed. 614	217
Standard Stock Food Co. v. Wright, 225 U. S. 540	28, 39, 75
State v. Atlantic Coast Line R. Co., 56 Fla. 617	743
v. Bates & Rogers Const. Co., 91 Wash. 181	819
v. Beaumont & G. N. R. Co., — Tex. Civ. App. —, 183 S. W. 120	801, 1279
v. Central Vermont R. Co., 81 Vt. 463	328
v. Chicago, M. & St. P. R. Co., 152 Iowa 317	744
v. Chicago, M. & St. P. R. Co., 115 Minn. 51	78
v. Chicago, M. & St. P. R. Co., 136 Wis. 407	745, 1433, 1435
v. Chicago, St. P., M. & O. Ry. Co., 40 Minn. 267	766
v. Cumberland & P. R. Co., 105 Md. 478	267, 767
v. Doe, 92 Kan. 212	33
v. Duluth St. Ry. Co., 76 Minn. 96	231
v. Goold, 53 Me. 279	420
v. Missouri Pac. R. Co., 96 Kan. 609	33
v. Missouri Pac. R. Co., 242 Mo. 339	744
v. Missouri Pac. R. Co., 212 Mo. 658	56, 99, 744, 1433
v. Northern Pac. R. Co., 36 Mont. 582	744
v. Orange & N. W. Ry. Co., — Tex. Civ. App. —, 181 S. W. 494	801, 1271, 1288, 1399

[REFERENCES ARE TO PAGES]

State v. Seaboard Air Line R. Co., 169 N. C. 295	33	Stoddard Lumber Co. v. Oregon-Washington R. & Nav. Co., 84 Ore. 399	544
v. Seagraves, 111 Mo. App. 353	766	Stone, In re, 173 N. C. 208	1053, 1054, 1084
v. Southern R. Co., 153 N. C. 559	78	Stone v. Farmers' Loan & Trust Co., 116 U. S. 307	41, 69, 70, 72, 73, 743
v. United States Exp. Co., 164 Iowa 112	32	v. Illinois Cent. R. Co., 116 U. S. 347	70, 72
State ex rel. v. Adams Exp. Co., 171 Ind. 138	107	v. New Orleans & N. E. R. Co., 116 U. S. 352	70
State ex rel. Allen v. Pittsburgh & C. R. Co., 45 Md. 41	929	v. Wisconsin, 94 U. S. 181	63, 70, 71, 72
State ex rel. Chicago, M. & P. S. R. Co. v. Public Service Commission, 77 Wash. 529	78	Stool v. Southern Pac. Co., — Ore. —, 172 Pac. 101	785
v. Public Service Commission of Missouri, 269 Mo. 63	275, 768	Storm Lake Tub & Tank Factory v. Minneapolis & St. L. R. Co., 209 Fed. 895	460, 572, 580, 595
State ex rel. Corwin v. Indiana & Ohio Oil, Gas & Mining Co., 120 Ind. 575	12	Stoutenburgh v. Hennick, 129 U. S. 141	11
State ex rel. Crookston Lumber Co. v. District Court of Beltrami County, 131 Minn. 27	1107	Strommer v. Chicago, M. & St. P. R. Co., 38 S. D. 368	559
State ex rel. Great Northern R. Co. v. Railroad Commission of Washington, 60 Wash. 218	87	Strother v. Chicago, B. & Q. R. Co. (Mo.), 188 S. W. 1102	925, 942
State ex rel. Interstate Commerce Commission v. Chicago, K. & S. R. Co., 81 Fed. 783	207	v. Union Pac. R. Co., 220 Fed. 731	1151
State ex rel. Lusk v. Ellison, 271 Mo. 463	942	Stubblefield v. St. Louis & S. F. R. Co., 194 Mo. App. 396	580
State Freight Tax Case, 15 Wall. (U. S.) 232	38, 42	Stukes v. Southern Exp. Co., 96 S. C. 383	81
State Tonnage Tax Cases, 12 Wall. (U. S.) 204	15	Sturgeon v. State, 17 Ariz. 513	33
Stearns v. Chicago, R. I. & P. R. Co., 166 Iowa 566	800,	Sturges v. Detroit, G. H. & M. R. Co., 166 Mich. 231	530,
801, 922, 1271, 1274, 1287, 1307, 1310, 1330, 1332	480, 1332		532, 591
Steele v. Atlantic Coast Line R. Co., 103 S. C. 102	915,	Sullivan v. Chicago, M. & St. P. R. Co., 163 Wis. 583	704,
917, 922, 925, 926, 942, 1010, 1049, 1401, 1405	420		706, 811
Stephen v. Smith, 29 Vt. 160	420	Sunderland Bros. Co. v. Baltimore & O. S. W. R. Co., 196 Mo. App. 471	452
Stephens v. Central of Georgia R. Co., 138 Ga. 625	743	v. Baltimore & O. S. W. R. Co., 196 Mo. App. 154	467
Stevens & Russell v. St. Louis Southwestern Ry. Co., — Tex. Civ. App. —, 178 S. W. 810	530	Susquehanna Coal Co. v. City of South Amboy, 228 U. S. 665	47, 263
Stewart v. Baltimore & O. R. Co., 168 U. S. 445	1215	Suttle v. Choctaw, O. & G. R. Co., 75 C. C. A. 470, 144 Fed. 668	1281, 1410
v. People, 232 U. S. 665	17	Sutton v. St. Louis & S. F. R. Co., 159 Mo. App. 685	452,
Stiles, Gaddie & Stiles v. Louisville & N. R. Co., 129 Ky. 175	595		457, 467
Stockard v. Morgan, 185 U. S. 27	11	Sutton's Adm'r v. Louisville & N. R. Co., 168 Ky. 81	916, 943

[REFERENCES ARE TO PAGES]

Swanson v. Oregon-Washington R. & Nav. Co., 92 Wash. 423 981, 990, 1010	Terre Haute & L. R. Co. v. Erdel, 158 Ind. 344 451 v. Sherwood, 132 Ind. 129 575
Swartwood v. Lehigh Valley R. Co., 169 N. Y. App. Div. 759 855, 917, 925, 981	Terry v. Southern Pac. Co., — Cal. —, 169 Pac. 86 781
Sweeney v. Erving, 228 U. S. 233 951	Texarkana & Ft. S. Ry. Co. v. Casey, — Tex. Civ. App. —, 172 S. W. 729 1218
Sweet v. Chicago & N. W. R. Co., 157 Wis. 400 734, 735, 967, 994, 1064, 1074, 1244	Texas-Mexican Ry. Co. v. Sutherland, — Tex. Civ. App. —, 189 S. W. 983 531
Swift & Co. v. Hocking Valley R. Co., 243 U. S. 281 442 v. Johnson, 71 C. C. A. 619, 138 Fed. 867 1095	Texas & N. O. R. Co. v. Sabine Tram Co., 227 U. S. 111 38, 263, 265, 270, 761, 762, 770, 1301 v. Sabine Tram Co., — Tex. Civ. App. —, 121 S. W. 256 745
Symonds v. St. Louis & S. E. Ry. Co., 192 Fed. 353 1148	Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426 56, 154, 304, 436, 451, 453, 460, 463, 489, 493, 494, 679
Szymanski v. Blumenthal, 3 Pennew. (Del.) 558 1055	v. American Tie & Timber Co., 234 U. S. 138 438 449, 463, 492, 500
T.	
Taber v. Missouri Pac. Ry. Co., — Mo. —, 186 S. W. 688 1208, 1209	v. Archibald, 170 U. S. 665 952, 987, 1013, 1025
Tackett v. Mutual Realty Co., — Tex. Civ. App. —, 143 S. W. 347 1215	v. Barrett, 166 U. S. 617 952
Taenzër & Co. v. Chicago, R. I. & P. R. Co., 112 C. C. A. 153, 191 Fed. 543 439, 450, 456, 460	v. Behymer, 189 U. S. 468 927, 1025
Taff Vail Ry. Co. v. Jenkins, [1913] A. C. 1 1098	v. Cisco Oil Mill, 204 U. S. 449 440, 476
Tap Line Cases, 234 U. S. 1 203, 238, 239, 349, 350	v. Clark, 4 Tex. Civ. App. 611 458
Tapore v. Boston & M. R. R., — N. H. —, 100 Atl. 153 737, 989	v. Cox, 145 U. S. 593 1215
Tate v. Yazoo & M. V. R. Co., 78 Miss. 842 582	v. Davis, 93 Tex. 378 762
Taylor v. Com., 117 Va. 909 33 v. Maine Cent. R. Co., 87 Me. 299 538	v. Dickson Bros., — Tex. Civ. App. —, 167 S. W. 33 458
v. Southern Ry. Co., 178 Fed. 380 805	v. Harvey, 228 U. S. 319 987, 992
v. Taylor, 232 U. S. 363 706, 723, 946, 1083, 1084	v. Interstate Commerce Commission, 162 U. S. 197 141, 155, 156, 282, 306, 309, 311, 317, 318, 332, 333, 383, 384, 393, 628, 651
v. Wells, Fargo & Co., — C. C. A. —, 249 Fed. 109 757	v. Langbehn, — Tex. Civ. App. —, 158 S. W. 244 564
v. Wells, Fargo & Co., 136 C. C. A. 402, 220 Fed. 796 1131	v. Leslie, 62 Tex. Civ. App. 380 453, 468
Teel v. Chesapeake & O. R. Co. of Virginia, 123 C. C. A. 240, 204 Fed. 918 1148	v. McMillen, — Tex. Civ. App. —, 183 S. W. 773 1488
Temples v. Central of Georgia R. Co., 19 Ga. App. 307 946	v. Mugg, 202 U. S. 242 436, 451, 453, 460, 462, 476
Tennessee v. Pullman South- ern Car Co., 117 U. S. 51 16	v. Murphy, 238 U. S. 320 915
	v. Rasmussen, — Tex. Civ. App. —, 181 S. W. 212 855, 1149

[REFERENCES ARE TO PAGES]

Texas & P. R. Co. v. Rigsby, 241 U. S. 33 14, 51, 55, 99, 689, 721, 800, 922, 946, 1009, 1270, 1274, 1276, 1277, 1287, 1308, 1309, 1314, 1320, 1338, 1351, 1366, 1368, 1402	Tift v. Southern Ry. Co., 123 Fed. 789 304
v. Sherer, — Tex. Civ. App. —, 183 S. W. 404 783, 1307	Tilghman v. Seaboard Air Line R. Co., 167 N. C. 163 1032, 1245
v. Stewart, 228 U. S. 357 945	Tiller v. St. Louis & S. F. R. Co., 189 Fed. 994 1210
v. Taylor, 103 Tex. 367 744, 771	Tilley v. Hudson River R. Co., 24 N. Y. 471 1111, 1115
v. White, — Tex. Civ. App. —, 177 S. W. 1185 785, 822, 834, 981, 985, 1031	Tilt v. Kelsey, 207 U. S. 43 1156
v. Williams, — Tex. Civ. App. —, 200 S. W. 1149 861	Tinkham v. Boston & M. R. R., 77 N. H. 111 735, 1230
Thayer v. Denver & R. G. R. Co., 21 N. M. 330 1368	Tobin v. Bruce, — S. D. —, 162 N. W. 933 1053, 1085, 1098
Theo. Hamm Brewing Co. v. Chicago, R. I. & P. Ry. Co., 215 Fed. 672 34	Toledo, St. L. & W. R. Co. v. Gordon, 100 C. C. A. 572, 177 Fed. 152 1404, 1407
Thomas v. Blair, 185 Mich. 422 591, 595	v. Milner, — Ind. App. —, 110 N. E. 756 171
v. Boston & M. R. R., 134 C. C. A. 554, 219 Fed. 180 841	v. Slavin, 236 U. S. 454 46, 721, 723, 725, 728, 777, 915, 986, 1164, 1205
v. Chicago & N. W. Ry. Co., 202 Fed. 766 1057, 1065, 1152, 1200, 1201	Toledo & O. C. Ry. Co. v. Kibler, — Ohio St. —, 119 N. E. 733 548, 597
v. Lancaster Mills of Clinton, Massachusetts, 19 C. C. A. 88, 71 Fed. 481 596, 597	Toler v. Northern Pac. R. Co., 94 Wash. 360 917, 918, 919, 952, 981
v. Watt, 104 Mich. 201 1240	Tompkins v. International Paper Co., 106 C. C. A. 529, 183 Fed. 773 264
Thomas Bros. v. St. Louis & S. F. R. Co., 188 Mo. App. 22 81	Tonsellito v. New York Cent. & H. River R. Co., 87 N. J. L. 651 861, 862, 874, 895
Thompson v. Cincinnati, N. O. & T. P. R. Co., 165 Ky. 256 810, 836, 1231	Topore v. Boston & M. R. R., — N. H. —, 100 Atl. 153 855, 861, 917, 981
v. Minneapolis & St. L. R. Co., 133 Minn. 203 926, 943, 988, 1009	Tozer v. United States, 52 Fed. 917 207
v. State, 170 U. S. 343 1237	Tralich v. Chicago, M. & St. P. Ry. Co., 217 Fed. 675 821, 834, 1196
v. Wabash R. Co., 262 Mo. 468 764, 855, 1171, 1173, 1302	Travellers' Ins. Co. of Hart- ford v. Melick, 12 C. C. A. 544, 65 Fed. 178 946
Thompson-Houston Elec. Co. v. Simon, 20 Ore. 60 231	Treadway v. St. Louis, I. M. & S. R. Co., 127 Ark. 211 731, 821, 827, 832, 834, 1171, 1173, 1247
Thomson v. Columbia & P. S. R. Co., 205 Fed. 203 814	Tribby v. Wokee, 74 Tex. 142 1215
Thornbro v. Kansas City, M. & O. R. Co., 91 Kan. 684 800, 854, 868, 1271, 1287, 1401, 1405	Tripp v. Michigan Cent. R. Co., 151 C. C. A. 385, 238 Fed. 449 183
Thornton v. Seaboard Air Line Ry., 98 S. C. 348 919, 969, 994, 1075	Trowbridge v. Kansas City & W. B. Ry., 192 Mo. App. 52 745, 760, 764, 801, 860, 874, 881, 887, 888, 959
Tierman's Ex'r v. Security Building & Loan Ass'n, 152 Mo. 135 1240	

[REFERENCES ARE TO PAGES]

- Troxell v. Delaware, L. & W.  
R. Co., 180 Fed. 871 895,  
1173, 1242
- Troxler v. Southern Ry. Co.,  
124 N. C. 189 1307, 1401
- Truesdell v. Chesapeake & O.  
R. Co., 159 Ky. 718 481,  
822, 823, 827, 988, 1009,  
1022, 1401
- Tsmura v. Great Northern R.  
Co., 58 Wash. 316 807, 830, 1200
- Tullis v. Lake Erie & W. R.  
Co., 175 U. S. 348 706
- Turner v. State, 107 U. S. 38 40
- Twitchell v. Com., 7 Wall. (U.  
S.) 321 1237
- Tyler v. Defrees, 11 Wall. (U.  
S.) 331 109
- Tyndall v. New York Cent. &  
H. River R. Co., 213 N. Y.  
691 734, 1212  
v. New York Cent. & H.  
River R. Co., 162 N. Y.  
App. Div. 921 1208  
v. New York Cent. & H.  
River R. Co., 157 N. Y.  
App. Div. 186 953  
U.
- Ulrich v. New York, N. H. &  
H. R. Co., 193 Fed. 768 1149,  
1184, 1185, 1195, 1196
- Union Lime Co. v. Railroad  
Commission of Wisconsin, 144  
Wis. 523 78
- Union Pac. R. Co. v. American  
Smelting & Refining Co., 121  
C. C. A. 182, 202 Fed. 720  
457, 467  
v. Brady, 88 C. C. A. 579,  
161 Fed. 719 1410  
v. Daniels, 152 U. S. 684 952  
v. Fuller, 122 C. C. A. 359,  
204 Fed. 45 945  
v. Goodridge, 149 U. S. 680  
304, 308, 324, 436  
v. Hadley, 246 U. S. 330  
942, 945, 955  
v. Huxoll, 245 U. S. 535 949,  
1011  
v. O'Brien, 161 U. S. 451 1025  
v. Oregon-Washington Lum-  
ber Manufacturers' Ass'n,  
91 C. C. A. 51, 165 Fed.  
13 499, 522  
v. United States, 117 U. S.  
355 311, 393  
v. Updike Grain Co., 222  
U. S. 215 180, 286, 342,  
443, 654
- Union Pac. R. Co. v. Wyler,  
158 U. S. 285 1210, 1212
- Union Stockyards Co. of Omaha  
v. United States, 94 C. C. A.  
626, 169 Fed. 404 202, 237,  
741, 886, 1286, 1290
- United Lead Co. v. Lehigh  
Valley R. Co., 156 N. Y. App.  
Div. 525 173, 547
- United States v. Adams Exp.  
Co., 229 U. S. 381 56, 256  
v. Alexander, 2 Wall. (U.  
S.) 404 109  
v. Atchison, T. & S. F. Ry.  
Co., 234 U. S. 476 192, 651  
v. Atchison, T. & S. F. Ry.  
Co., 220 U. S. 37 1462, 1469  
v. Atchison, T. & S. F. Ry.  
Co., 90 C. C. A. 327,  
163 Fed. 517 923, 1310, 1319  
v. Atchison, T. & S. F. Ry.  
Co., 236 Fed. 154 1477  
v. Atchison, T. & S. F. Ry.  
Co., 220 Fed. 215 1386, 1387  
v. Atchison, T. & S. F. Ry.  
Co., 212 Fed. 1000 1391,  
1471  
v. Atchison, T. & S. F. Ry.  
Co., 167 Fed. 696 1310,  
1343, 1354, 1388, 1390, 1427  
v. Atchison, T. & S. F. Ry.  
Co., 166 Fed. 160 1482,  
1488, 1489  
v. Atchison, T. & S. F. Ry.  
Co., 163 Fed. 517 1314  
v. Atchison, T. & S. F. Ry.  
Co., 150 Fed. 442 1266, 1319  
v. Atlantic Coast Line R.  
Co., 128 C. C. A. 275,  
211 Fed. 897 1435, 1443  
1467  
v. Atlantic Coast Line R.  
Co., 214 Fed. 498 1286,  
1300, 1341  
v. Atlantic Coast Line R.  
Co., 153 Fed. 918 1265,  
1391, 1421, 1425  
v. Atlantic Coast Line R.  
Co., 141 N. C. 171 1420  
v. Baltimore & O. R. Co.,  
231 U. S. 274 176, 180,  
181, 348, 366, 443, 654  
v. Baltimore & O. R. Co.,  
226 Fed. 220 1463, 1484  
v. Baltimore & O. R. Co.,  
184 Fed. 94 1363  
v. Baltimore & O. R. Co.,  
176 Fed. 114 1336, 1426  
v. Baltimore & O. R. Co.,  
170 Fed. 456 1300, 1302,  
1310, 1354

[REFERENCES ARE TO PAGES]

United States v. Baltimore &  
O. S. W. R. Co., 226 U. S.  
14 175, 656, 753  
v. Baltimore & O. S. W. R.  
Co., 86 C. C. A. 223, 159  
Fed. 33 1425  
v. Barnow, 239 U. S. 74 48  
v. Boston & M. R. Co., 168  
Fed. 148 1354, 1363,  
1364, 1367, 1426, 1427  
v. Boyer, 85 Fed. 425 48  
v. Butler County R. Co.,  
234 U. S. 29 203, 234,  
238, 350  
v. Camden Iron Works, 150  
Fed. 214 218, 481  
v. Central of Georgia Ry.  
Co., 157 Fed. 893 842,  
1266, 1284, 1354, 1359,  
1426, 1427  
v. Chesapeake & O. R. Co.,  
130 C. C. A. 262, 213  
Fed. 748 1277, 1343,  
1352, 1386, 1387, 1388,  
1389, 1390, 1391  
v. Chicago, B. & Q. R. Co.,  
237 U. S. 410 800, 1329,  
1330, 1331  
v. Chicago Great Western  
Ry. Co., 162 Fed. 775  
267, 745, 766, 1266, 1284,  
1290, 1299, 1326, 1341,  
1388, 1390, 1425, 1426, 1427  
v. Chicago Junct. Ry. Co.,  
211 Fed. 724 1490  
v. Chicago, M. & P. S. Ry.  
Co., 218 Fed. 701 1435  
v. Chicago, M. & P. S. Ry.  
Co., 197 Fed. 624 856,  
1284, 1435, 1449, 1451, 1471  
v. Chicago, M. & P. S. Ry.  
Co., 195 Fed. 783 1448, 1450  
v. Chicago, M. & St. P. Ry.  
Co., 219 Fed. 1011 1435  
v. Chicago, M. & St. P. Ry.  
Co., 149 Fed. 486 763,  
1266, 1281, 1284, 1301,  
1319, 1359  
v. Chicago, P. & St. L. Ry.  
Co., 143 Fed. 353 1294, 1435  
v. Chicago, R. I. & P. Ry.  
Co., 173 Fed. 684 1265, 1266  
v. Chicago, St. P., M. & O.  
Ry. Co., 245 Fed. 179  
1489, 1490  
v. Chicago & A. Ry. Co.,  
148 Fed. 646 444

United States v. Chicago & N.  
W. Ry. Co., 219 Fed. 342  
1463, 1471, 1481, 1484  
v. Chicago & N. W. Ry.  
Co., 157 Fed. 616 763,  
1281, 1302, 1304, 1363  
v. Colorado Midland Co.,  
121 C. C. A. 194, 202  
Fed. 732 1390  
v. Colorado & N. W. R.  
Co., 85 C. C. A. 48, 157  
Fed. 342 746, 784, 1294  
v. Colorado & N. W. R. Co.,  
85 C. C. A. 27, 157 Fed.  
321 208, 264, 746, 748,  
842, 1284, 1294, 1295,  
1298, 1304  
v. Delaware, L. & W. R.  
Co., 238 U. S. 516 176, 766  
v. Delaware & H. Co., 213  
U. S. 366 176  
v. Denver & R. G. R. Co.,  
147 C. C. A. 132, 233  
Fed. 62 1463, 1484  
v. Denver & R. G. R. Co.,  
136 C. C. A. 275, 220  
Fed. 293 1463, 1484  
v. Denver & R. G. R. Co.,  
90 C. C. A. 329, 163 Fed.  
519 1310, 1319, 1354,  
1359, 1360, 1410  
v. Denver & R. G. R. Co.,  
197 Fed. 629 1448,  
1449, 1453, 1471  
v. Dewitt, 9 Wall. (U. S.)  
41 49, 743  
v. Dickson, 15 Pet. (U. S.)  
141 1486  
v. E. C. Knight Co., 156 U.  
S. 1 9, 13, 51  
v. Erie R. Co., 237 U. S.  
402 800, 1329, 1330,  
1331, 1340, 1351, 1386, 1388  
v. Erie R. Co., 236 U. S.  
259 182  
v. Erie R. Co., 129 C. C.  
A. 307, 212 Fed. 853 1332  
v. Erie R. Co., 209 Fed. 283  
442  
v. Erie R. Co., 166 Fed. 352  
267, 766, 843, 1299, 1300,  
1310  
v. Florida East Coast R.  
Co., 137 C. C. A. 571,  
222 Fed. 33 1435, 1464  
v. Fox, 95 U. S. 670 48  
v. Garbish, 222 U. S. 257 480



# TABLE OF CASES.

1843

[REFERENCES ARE TO PAGES]

United States v. Geddes, 65 C.  
C. A. 320, 131 Fed. 452 207,  
739, 748, 1294

v. Grand Rapids & I. Ry.  
Co., 140 C. C. A. 177,  
224 Fed. 667 1435, 1462

v. Grand Rapids & I. Ry.  
Co., 244 Fed. 609 1334

v. Grand Trunk Ry. Co. of  
Canada, 225 Fed. 283 437

v. Grand Trunk Ry. Co. of  
Canada, 203 Fed. 775  
1300, 1323, 1330

v. Great Northern Ry. Co.,  
144 C. C. A. 209, 229  
Fed. 927 1267, 1336, 1373

v. Great Northern Ry. Co.,  
136 C. C. A. 238, 220  
Fed. 630 1471, 1473

v. Great Northern Ry. Co.,  
206 Fed. 838 1435, 1459

v. Great Northern Ry. Co.,  
157 Fed. 288 460

v. Great Northern Ry. Co.,  
150 Fed. 229 1310

v. Great Northern Ry. Co.,  
145 Fed. 438 1265

v. Hanley, 71 Fed. 672  
154, 311

v. Harris, 106 U. S. 629 48

v. Houston Belt & Termi-  
nal R. Co., 125 C. C. A.  
481, 205 Fed. 344 1421,  
1435, 1463, 1465, 1471, 1486

v. Illinois Cent. R. Co., 101  
C. C. A. 15, 177 Fed. 801  
1266, 1345

v. Illinois Cent. R. Co., 95  
C. C. A. 628, 170 Fed.  
542 1319, 1425

v. Illinois Cent. R. Co., 234  
Fed. 433 1462

v. Illinois Cent. R. Co., 230  
Fed. 940 298

v. Illinois Cent. R. Co., 180  
Fed. 630 1448, 1449, 1450

v. Illinois Cent. R. Co., 166  
Fed. 997 1365, 1425, 1426

v. Illinois Cent. R. Co., 156  
Fed. 182 1319, 1325, 1426

v. Illinois Terminal R. Co.,  
168 Fed. 546 438, 745

v. International & G. N. R.  
Co., 98 C. C. A. 392, 174  
Fed. 628 800

v. Interstate Commerce  
Commission, — U. S. —,  
62 L. Ed. —, 38 Sup. Ct.  
408 524

United States v. Joint-Traffic  
Ass'n, 171 U. S. 505 9, 14,  
15, 90

v. Kansas City Southern  
Ry. Co., 121 C. C. A.  
136, 202 Fed. 828 1421,  
1443, 1448, 1463, 1471,  
1476, 1481, 1486

v. Kansas City Southern  
Ry. Co., 189 Fed. 471  
1421, 1443, 1449, 1471,  
1473, 1481, 1482, 1486

v. Lehigh Valley R. Co.,  
220 U. S. 257 176

v. Lehigh Valley R. Co.,  
135 C. C. A. 282, 219  
Fed. 532 1471, 1481

v. Lehigh Valley R. Co.,  
222 Fed. 685 439

v. Lehigh Valley R. Co.,  
162 Fed. 410 1310

v. Louisiana & P. R. Co.,  
234 U. S. 1 234, 654

v. Louisville & J. Bridge  
Co., 236 Fed. 1001 1329

v. Louisville & N. R. Co.,  
236 U. S. 318 186,  
353, 651, 662, 679

v. Louisville & N. R. Co.,  
235 U. S. 314 353,  
394, 651, 679

v. Louisville & N. R. Co.,  
93 C. C. A. 58, 167 Fed.  
306 1425

v. Louisville & N. R. Co.,  
162 Fed. 185 1302,  
1343, 1354, 1426

v. Louisville & N. R. Co.,  
156 Fed. 193 1389,  
1398

v. Martinez, 195 U. S. 469 1210

v. Merchants' & Manufactur-  
ers' Traffic Ass'n of Sac-  
ramento, 242 U. S. 178 651

v. Miller, 223 U. S. 599  
437, 440

v. Miller, 187 Fed. 375 440

v. Milwaukee Refrigerator  
Transit Co., 142 Fed. 247 325

v. Minneapolis & St. L. R.  
Co., 236 Fed. 414 1447

v. Missouri, K. & T. Ry. Co.,  
208 Fed. 957 1468

v. Missouri Pac. Ry. Co.,  
156 C. C. A. 466, 244  
Fed. 38 1435, 1463,  
1471, 1484

v. Missouri Pac. Ry. Co.,  
130 C. C. A. 5, 213 Fed.  
169 1471

[REFERENCES ARE TO PAGES]

United States v. Missouri Pac.  
 Ry. Co., 235 Fed. 944 1462, 1463  
 v. Missouri Pac. Ry. Co.,  
 206 Fed. 847 1435,  
 1448, 1459  
 v. Missouri Pac. Ry. Co.,  
 65 Fed. 903 154  
 v. Montpelier & W. R. R.,  
 175 Fed. 874 1426  
 v. Morsman, 42 Fed. 448  
 256, 757  
 v. Nashville, C. & St. L. Ry.,  
 217 Fed. 254 662  
 v. Nevada County Narrow  
 Gauge R. Co., 167 Fed.  
 695 1343, 1353, 1358, 1427  
 v. New York Cent. & H.  
 River R. Co., 134 C. C.  
 A. 369, 218 Fed. 611 1471  
 v. New York Cent. & H.  
 River R. Co., 205 Fed.  
 428 1332  
 v. Norfolk & W. Ry. Co., 74  
 C. C. A. 404, 143 Fed.  
 266 343, 345  
 v. Norfolk & W. Ry. Co.,  
 184 Fed. 99 1278, 1281  
 v. Northern Pac. R. Co., 131  
 C. C. A. 372, 215 Fed.  
 64 1471, 1478  
 v. Northern Pac. R. Co.,  
 213 Fed. 539 1448, 1451  
 v. Northern Pac. Terminal  
 Co., 144 Fed. 861 745,  
 842, 1286, 1291, 1294, 1302  
 v. Northwestern Pac. R. Co.,  
 235 Fed. 965 1386  
 v. Ohio Oil Co., 234 U. S.  
 548 242, 243  
 v. Oregon Short Line R. Co.,  
 180 Fed. 483 1265  
 v. Oregon-Washington R. &  
 Nav. Co., 213 Fed. 688 1448  
 v. Pacific & A. Ry. & Nav.  
 Co., 228 U. S. 87 39, 463,  
 492, 493  
 v. Pennsylvania Co., 239  
 Fed. 761 1472, 1473  
 v. Pennsylvania Co., 237  
 Fed. 471 1386  
 v. Pennsylvania R. Co., 242  
 U. S. 208 635, 636  
 v. Pennsylvania R. Co., 239  
 Fed. 576 1435  
 v. Pennsylvania R. Co., 162  
 Fed. 408 1310  
 v. Pennsylvania R. Co., 153  
 Fed. 625 207, 218, 438

United States v. Pere Marquette  
 R. Co., 211 Fed. 220 761, 800,  
 1266, 1300, 1323, 1338  
 v. Pere Marquette R. Co.,  
 171 Fed. 586 1488  
 v. Philadelphia & R. Ry. Co.,  
 238 Fed. 428 1490  
 v. Philadelphia & R. Ry. Co.,  
 223 Fed. 215 1341, 1354,  
 1356, 1490  
 v. Philadelphia & R. Ry. Co.,  
 188 Fed. 484 283  
 v. Philadelphia & R. Ry. Co.,  
 184 Fed. 543 451  
 v. Philadelphia & R. Ry. Co.,  
 162 Fed. 403 1310, 1425  
 v. Philadelphia & R. Ry. Co.,  
 160 Fed. 696 1266, 1354,  
 1427  
 v. Pittsburgh, C. & St. L.  
 Ry. Co., 143 Fed. 360  
 1286, 1300, 1352  
 v. Ramsey, 116 C. C. A. 568,  
 197 Fed. 144 1285, 1434  
 v. Reading Co., 183 Fed. 427 628  
 v. Reese, 92 U. S. 214 48  
 v. Rio Grande Western R.  
 Co., 98 C. C. A. 293, 174  
 Fed. 399 1389  
 v. St. Joseph Stockyards Co.,  
 181 Fed. 625 202, 1487  
 v. St. Louis, I. M. & S. R.  
 Co., 154 Fed. 516 763,  
 843, 1300, 1302, 1390, 1398  
 v. St. Louis Southwestern  
 Ry. Co. of Texas, 106 C.  
 C. A. 230, 184 Fed. 28  
 1265, 1305, 1425, 1426  
 v. St. Louis Southwestern  
 Ry. Co. of Texas, 189  
 Fed. 954 1439, 1443,  
 1448, 1463  
 v. Sandoval, 231 U. S. 28 48  
 v. Shauver, 214 Fed. 154 48  
 v. Sioux City Stock Yards  
 Co., 162 Fed. 556 1487, 1489  
 v. Southern Pac. Co., 136  
 C. C. A. 351, 220 Fed.  
 745 1447, 1455, 1471, 1477  
 v. Southern Pac. Co., 126  
 C. C. A. 384, 209 Fed.  
 562 1463, 1471, 1481, 1483  
 v. Southern Pac. Co., 94  
 C. C. A. 629, 169 Fed.  
 407 1310, 1319, 1323, 1398  
 v. Southern Pac. Co., 167  
 Fed. 699 1310, 1319,  
 1325, 1326, 1354, 1389,  
 1390, 1425

[REFERENCES ARE TO PAGES]

- United States v. Southern Pac.  
Co., 154 Fed. 897 1310, 1319, 1388  
v. Southern Ry. Co., 170  
Fed. 1014 1265, 1354, 1426  
v. Southern Ry. Co., 164  
Fed. 347 1265  
v. Southern Ry. Co., 135  
Fed. 122 1266, 1298, 1326  
v. Spokane & I. E. R. Co.,  
206 Fed. 988 1296, 1305  
v. Standard Oil Co., 170  
Fed. 988 440  
v. Standard Oil Co., 148  
Fed. 719 295, 448  
v. Standard Oil Co. of In-  
diana, 155 Fed. 305  
208, 218, 745  
v. Sunday Creek Co., 194  
Fed. 252 481  
v. Swift & Co., 122 Fed. 529 10  
v. Tozer, 39 Fed. 369 328, 426  
v. Trans-Missouri Freight  
Ass'n, 166 U. S. 290 9, 14  
v. Trinity & B. V. R. Co.,  
128 C. C. A. 120, 211  
Fed. 448 1310, 1319,  
1386, 1387, 1389, 1391, 1421  
v. Tucker, 188 Fed. 741 9  
v. Union Mfg. Co., 240 U.  
S. 605 450  
v. Union Pac. R. Co., 94  
C. C. A. 433, 169 Fed. 65  
1487  
v. Union Stock Yard &  
Transit Co. of Chicago,  
226 U. S. 286 56, 154,  
202, 208, 235, 237, 263,  
273, 283, 295, 437, 450,  
456, 480, 746, 763, 886,  
1284, 1300  
v. Union Stock Yard &  
Transit Co. of Chicago,  
192 Fed. 330 746  
v. Union Stock Yards Co.  
of Omaha, 94 C. C. A.  
626, 169 Fed. 404 1293  
v. Union Stock Yards Co.  
of Omaha, 161 Fed. 919  
741, 1286, 1291, 1294  
v. Vaccaro Bros. & Co., 230  
Fed. 943 264  
v. Vacuum Oil Co., 153  
Fed. 598 218  
v. Wells-Fargo Exp. Co.,  
161 Fed. 606 256  
v. Western & A. R. Co.,  
184 Fed. 336 1284, 1352  
v. Wheeling & L. E. R. Co.,  
167 Fed. 198 842, 1286,  
1300, 1302
- United States v. Wood, 145 Fed.  
405 218, 438, 482  
v. Yazoo & M. V. R. Co.,  
203 Fed. 159 1443  
United States Exp. Co. v.  
Cohn, 108 Ark. 115 541  
v. State, 223 U. S. 335 42  
United States ex rel. Attorney  
General v. Union Stock  
Yard & Transit Co. of  
Chicago, 192 Fed. 330 264,  
745, 1293  
United States ex rel. Coffman  
v. Norfolk & W. Ry. Co.,  
109 Fed. 831 346, 635  
United States ex rel. Inter-  
state Commerce Commission  
v. Chicago, K. & S. R. Co.,  
81 Fed. 783 1294  
v. Seaboard Ry. Co., 82  
Fed. 563 207, 218  
United States ex rel. King-  
wood Coal Co. v. West Vir-  
ginia Northern R. Co., 125  
Fed. 252 343, 346, 635  
United States ex rel. Morris  
v. Delaware, L. & W. R. Co.,  
40 Fed. 101 142, 305, 311  
United States ex rel. Pit-  
cairn Coal Co. v. Baltimore  
& O. R. Co., 165 Fed. 113  
342, 345  
United States Fidelity & Guar-  
anty Co. of Baltimore v.  
Com., 231 U. S. 394 10  
United States Horse Shoe Co.  
v. American Exp. Co., 250  
Pa. 527 173, 452, 456
- V.
- Van Brimmer v. Texas & P.  
Ry. Co., 190 Fed. 394 869  
Vance v. W. A. Vandercook  
Co., 170 U. S. 438 17, 21, 32, 38  
Vandalia R. Co. v. Holland,  
183 Ind. 438 783, 860, 866,  
867, 873  
v. Stringer, 182 Ind. 676  
722, 1196, 1198, 1208, 1243  
Van Epps v. Atlantic Coast  
Line R. Co., 105 S. C. 406  
531, 544  
Vanordstrand v. Northern  
Pac. R. Co., 86 Wash. 655 937  
Van Patten v. Chicago, M. &  
St. P. R. Co., 81 Fed. 545  
155, 156, 460, 463, 467  
v. Chicago, M. & St. P. R.  
Co., 74 Fed. 981 499  
v. Waugh, 122 Iowa 302 1211

[REFERENCES ARE TO PAGES]

Van Winkle v. State, 4 Boyce (Del.) 578	33	Wabash R. Co. v. United States, 93 C. C. A. 393, 168 Fed. 1 800, 1265, 1284, 1286, 1287, 1425	
Vaughan v. St. Louis & S. F. R. Co., 177 Mo. App. 155 722, 725, 731, 856, 966, 1171, 1173, 1174, 1209		Wabash, St. L. & P. Ry. Co. v. People, 118 U. S. 557 14, 38, 41, 43, 64, 72, 146, 743	
Vialett v. Consolidated R. & Power Co., 30 Utah 260	1135	Wadley Southern R. Co. v. State, 235 U. S. 651 90, 91 v. State, 137 Ga. 497 370	
Viek v. New York Cent. & H. River R. Co., 95 N. Y. 267	785	Wagner v. Chicago, R. I. & P. R. Co., 277 Ill. 114 761, 884, 922, 1180, 1195, 1196, 1221 v. Chicago & A. R. Co., 265 Ill. 245 722, 729, 751, 860, 1134, 1178	
Vickery v. New London Northern R. Co., 87 Conn. 634 705, 724, 1017, 1026, 1187		Wahle v. Great Northern R. Co., 41 Mont. 326 576	
Victor Produce Co. v. Western Transit Co., 135 Minn. 121 452, 543		Waina v. Pennsylvania Co., 251 Pa. 213 703, 822, 827, 917, 1033, 1045	
Virginia Bridge & Iron Co. v. Jordan, 143 Ala. 603	784	Wald v. Pittsburgh, C. C. & St. L. R. Co., 162 Ill. 545 596	
Virginia-Carolina Peanut Co. v. Atlantic Coast Line R. Co., 166 N. C. 62 452, 458, 467		Walker v. Iowa Cent. Ry. Co., 241 Fed. 395 1180, 1210, 1212, 1213	
Virginia & S. W. R. Co. v. Hill, 119 Va. 837	942, 959	v. Keenan, 19 C. C. A. 668, 73 Fed. 755 442	
Virginian R. Co. v. Andrews' Adm'x, 118 Va. 482 922, 959, 1496		v. Sauvinet, 92 U. S. 90 1237	
v. Linkous, 148 C. C. A. 543, 235 Fed. 49 914, 959		v. Western Transp. Co., 3 Wall. (U. S.) 150 743	
v. Linkous, 144 C. C. A. 386, 230 Fed. 88 915, 959, 961		Walling v. People, 116 U. S. 446 15	
v. United States, 139 C. C. A. 278, 223 Fed. 748 1328, 1334, 1338, 1373		Wallingford v. Atchison, T. & S. F. Ry. Co., — Kan. —, 167 Pac. 1136 606	
Voelker v. Chicago, M. & St. P. Ry. Co., 116 Fed. 867. 763, 1266, 1281, 1286, 1302, 1326, 1341, 1420		Walsh v. Alaska Steamship Co., — Wash. —, 172 Pac. 269 693	
Vollmers v. New York Cent. R. Co., — N. Y. App. Div. —, 167 N. Y. Supp. 426	835	v. Lake Shore & M. S. R. Co., 185 Mich. 177 873, 916, 1034, 1042	
Voris v. Chicago, M. & St. P. R. Co., 172 Mo. App. 125 810, 836		v. New York, N. H. & H. R. Co., 223 U. S. 1 719, 842 v. New York, N. H. & H. R. Co., 173 Fed. 494 713, 1176	
W.		Walton v. Pryor, 276 Ill. 563 854, 1146, 1149	
Wabash R. Co. v. Cregan, 23 Ind. App. 1 1095		v. Southern Ry. Co., 179 Fed. 175 1180, 1200	
v. Hayes, 234 U. S. 86 704, 721, 723, 724, 728, 734, 777, 1162, 1166, 1167, 1194, 1204, 1229		Ward v. Hobbs, L. R. 4 App. Cas. 13, 48 L. J. Q. B. 281, 40 L. T. 73, 27 Wkly. Rep. 114, 3 Eng. Rul. Cas. 125 1347	
v. McDaniels, 107 U. S. 454 928		v. Maryland, 12 Wall. (U. S.) 418 38	
v. Priddy, 179 Ind. 483 171, 437, 451, 456, 542		v. Missouri Pac. Ry. Co., 158 Mo. 226 452	
v. Sloop, 200 Mo. 198 477			
v. United States, 97 C. C. A. 284, 172 Fed. 864 1319, 1355			

[REFERENCES ARE TO PAGES]

- Wardlow v. Andrews, — Tex.  
 Civ. App. —, 180 S. W. 1161  
 461, 468, 477  
 Ware & Leland Co. v. Mobile  
 County, 209 U. S. 405 10, 13  
 Washington, A. & Mt. V. R.  
 Co. v. Downey, 236 U. S. 190 758  
 Washington, B. & A. Elec. R.  
 Co. v. Owens, — Md. —, 101  
 Atl. 532 753, 775, 781, 846  
 Washington ex rel. Oregon R.  
 & Nav. Co. v. Fairchild, 224  
 U. S. 510 69, 83, 91  
 Washington Horse Exch. v.  
 Louisville & N. R. Co., 171  
 N. C. 65 173, 563  
 Washington, P. & C. Ry. Co.  
 v. Magruder, 198 Fed. 218 1471  
 Washington R. Co. v. Downey,  
 40 App. Cas. (D. C. ) 147 754  
 Washington Ry. & Elec. Co. v.  
 Scala, 244 U. S. 630 752,  
 753, 754  
 Washington & G. R. Co. v.  
 Harmon's Adm'r, 147 U. S.  
 571 735, 1050  
 v. McDade, 135 U. S. 554  
 927, 1253  
 Waters v. Guile, 148 C. C. A.  
 298, 234 Fed. 532 721, 783, 854  
 Watson v. St. Louis, I. M. & S.  
 Ry. Co., 169 Fed. 942  
 695, 708, 1180  
 Watts v. Ohio Valley Elec. R.  
 Co., 78 W. Va. 144  
 706, 719, 753, 858  
 Webb, Ex parte, 225 U. S. 663 48  
 Webber v. Virginia, 103 U. S.  
 334 15  
 Webster v. Union Pac. R. Co.,  
 200 Fed. 597 1488  
 Weed v. Panama R. Co., 17 N.  
 Y. 362 595  
 Wegener v. Chicago & N. W.  
 R. Co., 162 Wis. 322 607  
 Welch Lumber Co. v. Norfolk &  
 W. R. Co., 137 N. Y. App.  
 Div. 248 173, 532  
 Wells, Fargo & Co. v. Neiman-  
 Marcus Co., 227 U. S. 469  
 179, 249, 257, 456, 529, 542  
 Welton v. State, 91 U. S. 275  
 9, 14, 18, 19, 21  
 Werner Saw Mill Co., Louis v.  
 Kansas City Southern R. Co.,  
 194 Mo. App. 618 761, 770, 1301  
 Wesseler v. Great Northern R.  
 Co., 90 Wash. 234 764, 908  
 West v. Atlantic Coast Line R.  
 Co., — N. C. —, 93 S. E. 479 903  
 West v. Kansas Natural Gas Co.,  
 221 U. S. 229 8, 12, 17, 44  
 West Jersey Trust Co. v.  
 Philadelphia & R. R. Co., 88  
 N. J. L. 102  
 723, 727, 1034, 1042, 1046  
 West Virginia v. Adams Exp.  
 Co., 135 C. C. A. 464, 219  
 Fed. 794 33  
 West Virginia Northern R. Co.  
 v. United States, 67 C. C. A.  
 220, 134 Fed. 198 343, 346  
 Western Maryland R. Co. v.  
 Sanner, 130 Md. 581 915, 916  
 Western New York & P. R. Co.  
 v. Penn Refining Co. of Oil  
 City, Pennsylvania, 70 C. C.  
 A. 23, 137 Fed. 343 628  
 Western Oil Refining Co. v.  
 Lipscomb, 244 U. S. 346 770  
 Western Ry. of Alabama v.  
 Mays, 197 Ala. 367 703,  
 745, 775, 783, 857, 901, 926,  
 988, 1032, 1040, 1049, 1075, 1405  
 Western Transit Co. v. A. C.  
 Leslie & Co., 242 U. S. 448  
 530, 541, 770  
 Western Transp. Co. v. Downer,  
 11 Wall. (U. S.) 129 593, 596  
 Western U. Tel. Co. v. Attorney  
 General of Com. of Massa-  
 chusetts, 125 U. S. 530 42  
 v. Bailey, 108 Tex. 427 249  
 v. Bank of Spencer, —  
 Okla. —, 156 Pac. 1175 247  
 v. Bates, 93 Ga. 352 100  
 v. Bilisoly, 116 Va. 562  
 102, 246, 247, 248  
 v. Bolling, 120 Va. 413  
 246, 247, 248, 249  
 v. Bright, 90 Va. 778 100  
 v. Brown, 234 U. S. 542  
 56, 101, 246, 249  
 v. Call Pub. Co., 181 U. S.  
 92 141, 304, 306, 326  
 v. Chiles, 214 U. S. 274 101  
 v. City of Fremont, 43 Neb.  
 499 246  
 v. City of Richmond, 224 U.  
 S. 160 42  
 v. Commercial Milling Co.,  
 218 U. S. 406 101, 246, 254  
 v. Compton, 114 Ark. 193  
 56, 102, 246, 247, 248  
 v. Crovo, 220 U. S. 364 56,  
 101, 246  
 v. First Nat. Bank of  
 Berryville, 116 Va. 1009  
 102, 248  
 v. Foster, — U. S. —, 62 L.  
 Ed. —, 38 Sup. Ct. 438 104

[REFERENCES ARE TO PAGES]

- Western U. Tel. Co. v. Foster,  
224 Mass. 365 246  
v. Holder, 117 Ark. 210 247  
102, 247  
v. Hughes, 104 Va. 240 246, 248, 766  
v. James, 162 U. S. 650 9, 245  
93, 97, 100, 245  
v. James, 90 Ga. 254 100  
v. Johnson, 115 Ark. 564 246, 247, 249  
v. Kaufman, — Okla. —, 162 Pac. 708 247, 248, 268, 767  
v. New Hope, 187 U. S. 419 42, 743  
v. Pendleton, 122 U. S. 347 9, 10, 42, 51, 101, 246  
v. Pennsylvania R. Co., 195 U. S. 540 42  
v. Powell, 94 Va. 268 100  
v. Reynolds, 100 Va. 459 248  
v. Schoonmaker, — Tex. Civ. App. —, 181 S. W. 263 247  
v. Seay, 132 U. S. 472 245  
v. Showers, 112 Miss. 411 246, 248  
v. Simpson, 117 Ark. 156 102, 247, 248  
v. Smith, — Ala. —, 75 So. 393 542  
v. Smith, — Tex. Civ. App. —, 188 S. W. 702 247, 248  
v. State, 105 U. S. 460 14, 15, 246  
v. State ex rel. Coleman, 216 U. S. 1 18, 20, 38, 42, 451  
v. Stewart, 120 Ark. 631 246, 249  
v. Texas, 105 U. S. 460 20, 246  
v. Tyler, 90 Va. 297 100, 246  
v. White, — Tex. Civ. App. —, 162 S. W. 905 929  
Western & A. R. Co. v. White Provision Co., 142 Ga. 246 493, 499, 523  
Westland v. Gold Coin Mines Co., 41 C. C. A. 193, 101 Fed. 59 952  
Westling v. Atchison, T. & S. F. Ry. Co., — Kan. —, 165 Pac. 669 737, 916  
Whalen v. Gordon, 37 C. C. A. 70, 95 Fed. 305 1211  
v. New York Cent. & H. River R. Co., 173 N. Y. App. Div. 268 761, 842  
Whaley v. Catlett, 103 Tenn. 347 1142  
Whalley v. Philadelphia & R. Co., 248 Pa. 298 922, 1330  
Wheeling Terminal R. Co. v. Russell, 126 C. C. A. 519, 209 Fed. 795 883, 1281, 1286, 1362, 1426  
White v. Lehigh Valley R. Co., 220 N. Y. 181 855, 917, 926, 942  
v. Missouri Pac. Ry. Co. (Mo.), 178 S. W. 83 1146  
v. Seaboard Air Line Ry., 14 Ga. App. 139 929  
White's Adm'x v. Central Vermont R. Co., 87 Vt. 330 723, 734, 942, 1187  
Whiteside v. Brawley, 152 Mass. 133 1240  
Whittaker v. Illinois Cent. Ry. Co., 176 Fed. 130 1196  
Wichita Falls & N. W. Ry. Co. v. Puckett, — Okla. —, 157 Pac. 112 718  
Wichita Falls & W. Ry. Co. of Texas v. Asher, — Tex. Civ. App. —, 171 S. W. 1114 268, 453, 467, 468, 564, 767  
Wien v. New York Cent. & H. River R. Co., 166 N. Y. App. Div. 766 173  
Wiggins Ferry Co. v. City of East St. Louis, 107 U. S. 365 743  
Wight v. United States, 167 U. S. 512 309, 383, 454  
Wilczynski v. Pennsylvania R. Co., — N. J. L. —, 100 Atl. 226 754, 855  
Wiles v. Great Northern R. Co., 125 Minn. 348 1030  
Willcox v. Consolidated Gas Co., 212 U. S. 19 69, 73  
Willett v. Illinois Cent. R. Co., 122 Minn. 513 922, 1307, 1310, 1343  
Willever v. Delaware, L. & W. R. Co., 89 N. J. L. 697 703, 822, 981, 989  
v. Delaware, L. & W. R. Co., 87 N. J. L. 348 822, 824, 827, 834  
Williams v. Chicago & A. R. Co., 135 Ill. 491 1347  
v. Fears, 179 U. S. 270 10, 13  
v. Pryor, 272 Mo. 613 60, 986  
Williams, H. B., Inc. v. Western U. Tel. Co., 203 Fed. 140 247, 249  
Wilmington Transp. Co. v. Railroad Commission of California, 236 U. S. 151 44, 94, 212

[REFERENCES ARE TO PAGES]

Wilson v. Chicago Great Western R. Co., — Mo. App. —, 190 S. W. 22	543	Wood, Hagenbarth Cattle Co. v. Galveston, H. & S. A. Ry. Co., — Tex. Civ. App. —, 130 S. W. 857	744
v. Everett, 139 U. S. 616	518	Woodecock v. Bostic, 128 N. C. 243	1215
v. Grand Trunk Ry. Co., — N. H. —, 97 Atl. 981	914, 917, 959	Woodruff v. Parham, 9 Wall. (U. S.) 123	13
v. Grand Trunk Ry. Insurance & Provident Society, — N. H. —, 98 Atl. 478	1132	v. Yazoo & M. V. R. Co., 137 C. C. A. 411, 210 Fed. 849	927
v. Kansas City, St. J. & C. B. R. Co., 60 Mo. 184	744	Woodward v. Northern Pac. R. Co., 16 N. D. 38	1211
v. New, 243 U. S. 332 15, 16, 50, 52, 690, 1509		Worley v. Southern R. Co., 169 N. C. 105	1330
v. United States, 232 U. S. 563	51	Wright v. Adams Exp. Co., 230 Pa. 635	173
v. United States, 221 U. S. 361	679, 680	v. Chicago, R. I. & P. R. Co., 94 Neb. 317	805, 858
v. United States, 220 U. S. 614	679	v. Yazoo & M. V. R. Co., 197 Fed. 94	979
v. Welch, 157 Mass. 77	1215	Wynn v. Wabash R. Co., 111 Mo. App. 642	312
Winfield v. Erie R. Co., 88 N. J. L. 619	727	Wynne v. Liverpool & L. & G. Ins. Co., 71 N. C. 121	1215
v. New York Cent. & H. River R. Co., 216 N. Y. 284	58	Y.	
Winfree v. Northern Pac. R. Co., 227 U. S. 296	1205, 1212	Yazoo & M. V. R. Co. v. Baldwin, 113 Tenn. 205	291
v. Northern Pac. R. Co., 97 C. C. A. 392, 173 Fed. 65	1142	v. Georgia Home Ins. Co., 85 Miss. 7	290
Winkler v. Philadelphia & R. R. Co., 4 Pennw. (Del.) 80	743, 842, 1287, 1288, 1407	v. Greenwood Grocery Co., 227 U. S. 1 38, 42, 56, 75, 77	
Winona & St. P. R. Co. v. Blake, 94 U. S. 180	63, 70, 71	v. Houston, — Miss. —, 75 So. 690 703, 705, 775, 834	
Winslow v. Missouri, K. & T. Ry. Co. (Mo. App.), 192 S. W. 121	917, 959, 981, 989, 1031	v. Mullins, 115 Miss. 343	855, 947, 948, 1146
Winters v. Minneapolis & St. L. R. Co., 127 Minn. 532	1197	v. Wright, 235 U. S. 376	987, 994, 1024, 1162
v. Minneapolis & St. L. R. Co., 126 Minn. 260	735, 970	v. Wright, 125 C. C. A. 25, 207 Fed. 281	1127, 1129, 1244
Wisconsin Cent. R. Co. v. United States, 94 C. C. A. 444, 169 Fed. 76	438, 654	Yoakum v. Lusk, — Mo. App. —, 193 S. W. 635	916, 1030, 1075
Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287	69, 70, 91	York v. St. Louis, I. M. & S. R. Co., 86 Ark. 244	1343, 1401
Wise v. Chicago, B. & Q. R. Co. Relief Department, 133 Minn. 434	1131	York Mfg. Co. v. Illinois Cent. R. Co., 3 Wall. (U. S.) 107	536, 558, 576
Wolf v. American Exp. Co., 43 Mo. 421	596	Yorke Furniture Co. v. Southern R. Co., 162 N. C. 138	79, 458
Wood v. Lenawee Circuit Judge, 84 Mich. 521	1215	Yost v. Union Pac. R. Co., 245 Mo. 219	1353, 1410
v. Maine Cent. R. Co., 98 Me. 98	290	Young v. Lusk, 268 Mo. 625	703, 874, 917, 981, 1009, 1049, 1401, 1405
		v. Norfolk & W. R. Co., 171 Ky. 510	810, 942, 945, 989, 1009, 1401

[REFERENCES ARE TO PAGES]

	Zikos v. Oregon R. & Nav. Co., 179 Fed. 893 737, 821, 823, 827, 834, 894, 974
Zavitovsky v. Chicago, M. & St. P. R. Co., 161 Wis. 461	Zimmerman v. Funchion, 89 C. C. A. 53, 161 Fed. 859 1327
704, 706, 808, 838, 900, 1204	Zitnik v. Union Pac. R. Co., 95 Neb. 152 1064, 1074
Zenz v. Industrial Acc. Com- mission, — Cal. —, 168 Pac. 364	Zoller Hop. Co. v. Southern Pac. Co., 72 Ore. 262 173, 461, 468
905	



# INDEX

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## A.

### **Abandonment,**

children, see HUSBAND AND WIFE.

work abandoned, termination of liability to employes, Employers' Liability Act, 795.

### **Accidents,**

excuses for non-compliance with statutes,

Hours of Service Act,

definition of "casualty," "unavoidable accident," and "act of God," 1473.

derailments and collisions, as "casualties," 1478.

when statute is not applicable, 1471.

Twenty-Eight-Hour Live Stock Law, 1488.

inspection, Boiler Inspection Act, text, 1638.

prevention,

automatic couplers, object of Congress in requiring, Safety Appliance Act, 1340.

steam hose not part of coupling, Safety Appliance Act, 1353.

Hours of Service Act,

construction of statute, remedial statute to be liberally construed, 1443.

purpose of Congress in enactment, 1442.

relief crews, duty to substitute, prevention of excessive hours, 1454.

violation of statute, duty of Interstate Commerce Commission, 1444.

purpose of Safety Appliance Act, 1265.

reports,

Boiler Inspection Act,

damage suits, reports not to be used, 1498.

filing by carriers, 1497.

orders of Interstate Commerce Commission, 1648, 1665.

publication by Interstate Commerce Commission, 1498.

Federal Accident Reports Act, Ch. LV, 1504-1506.

duties of "common carriers," under statute, 1504.

"foreign commerce," definition, 1504.

**Accidents—Continued.**

reports—continued.

“interstate commerce,” definition, 1504.

investigation by Interstate Commerce Commission, 1505.

penalty, failure to make report within thirty days after end of each month, 1505.

publication of reports, not to be used in damage suits, 1505.

text of statute, 1672.

investigation of accidents, power of Commerce Commission, 663.

monthly reports by carriers to Commerce Commission required, 661.

order of director general of railroads, 1685.

*res ipsa loquitur*, applicability of rule to actions under Federal Employers' Liability Act, 951.

**Accountant,**

employees engaged in interstate commerce, termination of work,

sleeping in cars, Federal Employers' Liability Act, 792.

**Accounting,**

apportionment of revenues of railroads,

order of director general of railroads, 1702.

passenger service, 1769.

equipment, order of director general of railroads, 1754.

federal control of railroads, order of director general, 1697.

settlement, order of director general of railroads, 1752.

**Accounts,**

compelling production of papers, Interstate Commerce Commission, 679.

discontinuance, order of director general of railroads, 1701.

evidence of interstate shipments, orders of Interstate Commerce Commission, Federal Employers' Liability Act, 1220.

form, text of Interstate Commerce Act, 1540.

records and memoranda of carriers, control of Commerce Commission, 656.

reports, annual reports by carriers, Commerce Commission may require, 661.

text of Interstate Commerce Act, 1537.

**Act of God,**

Hours of Service Act,

relief crews, duty to substitute, prevention of excessive hours, 1454.  
when statute is not applicable, 1471.

definition of “casualty,” “unavoidable accident,” and “act of God,” 1473.

loss and damage by initial carrier, burden of proof to establish liability or defenses, 594.

delay and act of God destroying property, federal rule as to negligence, 595.

**Act of God—Continued.**

Twenty-Eight-Hour Live Stock Law, excuse from complying with, accident, 1488.

**Actions,**

acceptance of benefits by employe, actions against joint tort-feasors not barred, Federal Employers' Liability Act, 1134.

Ash Pan Act, violation, penalties, 1502.

assumption of risk,

Employers' Liability Act,

abolition or modification by state constitution and statutes, effect, 984.

application, analysis of federal decisions, 996.

burden of proof on defendant, 1017.

conflict of decision, 979, 982.

defense not available, violation of Hours of Service Act, 1012.

violation of rules, 1015.

violation of Safety Appliance Act, 1008.

distinction from contributory negligence, 1006.

pleading of defense, necessity, 1017.

risks assumed, violation of state statutes not included, 1011.

Safety Appliance Act, assumption of risk under, Ch XLVIII, 1400-1415.

Boiler Inspection Act, violation of statute, penalties, 1498.

contracts, prohibition of Employers' Liability Act, release not a contract within statute, 1135.

contributory negligence under Safety Appliance Act, Ch. XLVIII, 1400-1415.

effect of Employers' Liability Act, 1404, 1406.

damages for violation of Interstate Commerce Act, see DAMAGES.

defects, care and diligence in discovering and repairing no defense, action under Safety Appliance Act, 1319.

defenses,

automatic couplers, lever on other side of car, availability of lever no defense, Safety Appliance Act, 1358.

exception to Hours of Service Act, burden of proving upon carrier, 1486.

negligence, violation of Safety Appliance Act, evidence of negligence not required, 1320.

operation of appliances, employe's failure to operate no offense, Safety Appliance Act, 1324.

discrimination, prohibition of Interstate Commerce Act, judgments by consent and waiver of defenses prohibited, 319.

election, cause of action under state law and Employers' Liability Act, time of sustaining motion to elect, 1227.

Employers' Liability Act, see title EMPLOYERS' LIABILITY ACT.

former adjudication, see title FORMER ADJUDICATION.

knowledge of defect, evidence, not element of violation of statute, Safety Appliance Act, 1318.

**Actions—Continued.**

- limitation of actions, see title **LIMITATION OF ACTIONS.**
- loss and damage by initial carrier,
  - action against connecting carrier barred by recovery against initial carrier, 553.
  - action by "lawful holder," of bill of lading, 584.
  - burden of proof to establish liability or defenses, 594.
  - connecting and terminal carrier's liability, Carmack Amendment, 598.
  - no liability for initial carrier's act, 600.
  - presumption of negligence against initial carriers, 601.
- parties to actions, see title **PARTIES.**
- personal injuries, action under Safety Appliance Act, similarity to actions for penalties, 1313.
- pleading, see title **PLEADING.**
- poor persons, permitting action by, Employers' Liability Act, 1248.
- procedure before Interstate Commerce Commission, Ch. XX, 664-686.
- procedure under Employers' Liability Act, controlling effect of state laws, 733.
- remedies,
  - Interstate Commerce Commission, amendment to statute giving additional remedies, 187.
  - limitation to employes of railroads, Employers' Liability Act, 729.
  - prohibition of attachment and garnishment, order of director general of railroads, 1783.
  - reservation of remedies, initial carrier's liability, Cummins Amendment, 579.
- removal of actions, see title **REMOVAL OF CAUSES.**
- repairs, movement for repairs, relief from penalty, liability for personal injuries not affected, Safety Appliance Act, 1396.
- Safety Appliance Act,
  - action for penalties, Ch. L, 1425-1427.
    - procedure controlled by state rules, 1419.
    - recovery not criminal action, 1425.
    - remedy for recovery, 1425.
  - actions for personal injuries, enforcement in state courts, 1416.
    - plaintiff not required to negative proviso, 1420.
  - pleading and practice, actions for personal injuries, Ch. XLIX, 1416-1424.
  - remedial provisions not limited to employes, 1269.
- stay of trial of action against railroad, order of director general, 1708.
- survival of actions, Employers' Liability Act,
  - beneficiaries, 1053.
    - existence as jurisdictional, 1056.
    - illegitimate children as next of kin, 1059.
    - "next of kin," determination by state law, 1058.

**Actions—Continued.**

survival of actions, Employers' Liability Act—continued.

petition, necessity of alleging survival of beneficiaries, 1200.

revival of suit by personal representative only, 1176.

statutory action not for equal benefit of surviving beneficiaries, 1081.

damages recoverable,

future earnings not recoverable, 1069.

necessity of pecuniary loss, 1063.

negligence, necessity of negligence to warrant recovery, 1072.

pain and suffering, award where death is not instantaneous, 1066.

no recovery where death is instantaneous, 1071.

statutory provision, 1062.

Twenty-Eight-Hour Live Stock Law, penalties for violation, recovery in civil action, 1490.

venue, see title VENUE.

war, federal control of carriers during period of war with Germany, actions, right to sue carriers under federal control, 129.

effect of statute upon other federal and state laws, 127.

willful wrongs not within Federal Employers' Liability Act, 976.

**Adamson Law,**

Ch. LVI, 1507-1509.

text, 1674.

**Address,**

Interstate Commerce Commission, 1575, 1585.

**Admiralty,**

see VESSELS.

rates for transportation by water, power of state to establish, absence of federal legislation, 94.

**Advertisements,**

money only may be received for transportation by carriers, Interstate Commerce Act, 479.

payment for transportation by advertising, invalidity of state statute, 81.

rates, filing and publication of interstate rates, effect, Ch. XIII, 430-483.

**Age,**

death, damages recoverable under Employers' Liability Act, compensatory damages, measure, 1073.

distribution, settlement by payment of lump sum, 1083.

measure of damages, various beneficiaries, 1111.

**Agents,**

Boiler Inspection Act, employees and railroads subject to, 1491.

Employers' Liability Act,

negligence, abolition of fellow-servant rule, 912.

parties defendant, agents and servants causing injury, non-liability, 1177.

statute not limited to acts of fellow-servants at common law, 924.

Hours of Service Act,

carriers and employees subject to, 1434.

limitation to employees engaged in or connected with movement of trains, 1447.

penalties, violation of statute, 1444.

Interstate Commerce Act,

information relating to business of interstate shippers, prohibition against giving, 194.

parties entitled to damages, excessive freight charges, consignors and consignees, 506.

posting names, text of Interstate Commerce Act, 1522.

rates, collection of scheduled rates mandatory, illustrations, 469.

penalty for making erroneous quotation of rate, damage to shippers, 473.

taxes, imports from foreign states, immunity from state legislation,

protection of Commerce Clause, 19.

**Air brakes,**

see BRAKES.

**Alaska,**

carriers subject to Interstate Commerce Act, 205.

**Aliens,**

dependents, recovery under Federal Employers' Liability Act, 1055.

**Amendments,**

Employers' Liability Act,

appeal, pleading and practice in state courts not federal questions. 1167.

limitations, amendment setting up new cause of action not allowed. 1210.

amendments allowed after two-year period, 1215.

petition under state law, recovery under Federal Act, omission supplied by answer, 1186.

procedure, controlling effect of state laws, 733.

pleading, power of Commerce Commission, 677.

rules of Interstate Commerce Commission, 1579.

Safety Appliance Act, amendments stating new cause of action not allowed, 1423.

**American Railway Association,**

drawbars, height, delegation of authority as to height, validity, Safety Appliance Act, 1280.

**Amusements,**

see THEATERS.

**Animals,**

assumption of risk, employees held to have assumed risk, Employers' Liability Act, 1022.

classification of freight, differential between raw material and manufactured products, no discrimination, 405.

defective cars containing live stock, moving with chains, Safety Appliance Act, 1397.

discrimination in rates,

conditions warranting different charges, 311.

difference in rates based upon difference in service not discriminatory, 326.

methods and means rendered unlawful, unjust discrimination as result, 315.

services by shippers, contracts requiring expedited services not open to all shippers, 357.

stopping carload shipments en route to finish loading, 397.

exception from requirements of Safety Appliance Act, statutory provision, 1385.

free passes, prohibition of giving of passes by Hepburn Act, exceptions, 181.

Hours of Service Act, exceptions, carrier must exercise high degree of diligence, 1475.

statute not applicable, definition of "casualty," "unavoidable accident," and "act of God," 1473.

illegitimate subjects of trade and commerce, prohibition of importation or exportation by states, 28.

imports from foreign states, immunity from state legislation, protection of Commerce Clause, 19.

interstate transportation,

shipments passing through another state, destination in state of origin of shipment, 267.

transfer of live stock between pens and tracks of trunk lines, 236.

limitation of liability, contract against carrier's own negligence, invalidity, stipulation filed with Commission, 578.

notice of claims, regulation by statute, Cummins Amendment, 568.

validity as to property other than live stock, Cummins Amendments, 567.

loss and damage, initial carrier's liability, full damage to live stock, Cummins Amendment, 565.

object and purpose of enacting second Cummins Amendment, 561.

"ordinary live stock," text of Interstate Commerce Act, 1543.

rates, publication and filing, changes prohibited, oral contracts contravening schedules unlawful, 455.

repair of cars, right to move in revenue trains or with other cars, Safety Appliance Act, 1391.

sheep, loading and unloading, time consumed not to be considered,

Twenty-Eight-Hour Live Stock Law, 1488.

**Animals—Continued.**

- state control of trains, absence of legislation by Congress, 86.
- state control over internal affairs, invalidity of federal laws and regulations encroaching upon state's power, 49.
- stock yard companies, interstate status, Safety Appliance Act, 1290.
- Twenty-Eight-Hour Live Stock Law, 1669; Ch. LII, 1487-1490.
  - application of, animals properly cared for, statute not applicable, 1490.
- Commerce Commission without jurisdiction to regulate rates, 659.
- duties of carriers, 1487.
- excuse from complying with, accident, 1488.
- extension of time, written request of owner, 1488.
- feeding animals at expense of owner, unloading pursuant to statute, 1489.
- loading and unloading live stock, time consumed not to be considered, exception as to sheep, 1488.
- violation of, penalties, 1489.
  - recovery in civil action, 1490.

**Appeal and error,**

- actions by poor persons, permitting, Employers' Liability Act, 1248.
- affirmance, federal control of carriers during war with Germany, 129.
- Boiler Inspection Act, appeal from decision of inspector, rights of carrier, 1494.
- directing verdict, refusal not reviewable unless clearly erroneous, Employers' Liability Act, 1169.
- federal question,
  - action under Employers' Liability Act,
    - binding effect of ruling of state courts, 1162.
    - manner of asserting, 1164.
  - petition not stating good cause of action under Federal Act, 1166.
  - pleading and practice in state courts not federal questions, 1167.
  - pleading Federal Act and submitting case under state law, federal right not denied, 1165.
  - right to writ of error not always raised by pleadings, 1163.
  - statute requiring pleading of Federal Act, not denial of federal right, 1167.
- harmless error,
  - actions under Employers' Liability Act, 1243.
    - cause of action under state law, recovery where evidence shows case under Federal Act, 1189.
    - instruction, omission as harmless error, 1016.
  - interstate employment not alleged, submission of case not error, Safety Appliance Act, 1421.
- new trial, propriety of granting, action under Federal Employers' Liability Act, 1245.



**Appeal and error—Continued.**

- penalty added to judgment on affirmance, action under Employers' Liability Act, 1247.
- rehearing, see INTERSTATE COMMERCE COMMISSION; REHEARING.
- remittitur, damages recoverable under Employers' Liability Act, reduction, because of contributory negligence, cure of error by remittitur, 1127.
- review, extent of power, incidental and non-federal questions not reviewable, Federal Employers' Liability Act, 1161.
- review of judgment of state courts by United States Supreme court, Employers' Liability Act, 1153.
- writ of error,
  - action under Employers' Liability Act,
    - essentials of record, denial of right under Federal laws, 1159.
    - evidence insufficient to show liability, 1160.
    - excessive verdict not reviewable, 1166.
    - exclusion of remedy in certain cases, 1156.

**Appliances,**

- see BOILER INSPECTION ACT; SAFETY APPLIANCE ACT.
- Ash Pan Act, Ch. LIV, 1502-1503.
- assumption of risk,
  - confusing with contributory negligence, instructions, 1012.
  - provision of Employers' Liability Act, 978.
- automatic couplers, statutory requirements, Safety Appliance Act, Ch. XLIV, 1339-1362.
- carrier's duty to exercise ordinary care, Employers' Liability Act, 927.
- contributory negligence as defense, recovery not barred, Employers' Liability Act, 1029.
- defects, delay incident to train operation not excuse for violation of Hours of Service Act, 1481.
- defects of equipment used in intrastate commerce as cause of injury, Employers' Liability Act, 973.
- power of Interstate Commerce Commission, 662.

**Argument,**

- rules of Interstate Commerce Commission, 1583.

**Ash Pan Act,**

- see LOCOMOTIVES.

**Assault,**

- negligence, willful wrongs not within Employers' Liability Act, 976.

**Assignments,**

- damages for violation of Interstate Commerce Act, assignment of claims, 526.
- duties imposed by Safety Appliance Act not assignable, 1325.

**Associations,**

    subjection to Interstate Commerce Act, 260.

**Attachment,**

    federal control of carriers during war with Germany, right to sue carriers under federal control, 129.

    prohibition of remedy, order of director general of railroads, 1783.

**Attorneys,**

    compensation prohibited, effecting legislation, order of director general of railroads, 1682.

    complaints to Commerce Commission, rules governing, 671.  
    who may make, 664.

    employment to aid Commerce Commission, 686.  
    text of statute, 1533.

    free passes, prohibition by Hepburn Act, exceptions, 181.

    liens, Employers' Liability Act, procedure, controlling effect of state laws, 733.

    prohibition from participation in elections, order of director general of railroads, 1782.

**Attorneys' fees,**

    damages for violation of Interstate Commerce Act, attorney's fees, services before Commission, allowance not permitted, 526.  
    statutory provision creating liability, 485.

    discrimination, action for unlawful discrimination, measure of damages, Interstate Commerce Act, 320.

**Auctions,**

    discrimination, exclusive privileges, auxiliary facilities at stations and terminal grounds, legality, 339.

    sale of unclaimed and perishable freight, order of director general of railroads, 1771.

**Automatic couplers,**

    actions for injuries, exhibition of model couplers, 1362.

    application of Safety Appliance Act, all cars, 1351.  
    coupling and uncoupling, 1352.

    common law rule, carrier's liability, 1252.

    construction of Safety Appliance Act, custom of railroad, effect in construing, 1267.

    contributory negligence as matter of law, choosing dangerous way to uncouple cars, safe method available, 1409.

    contributory negligence, choosing dangerous way to uncouple cars, instructions held erroneous, 1412.

**defects,**

    care and diligence in discovering and repairing no defense to action, 1319.

    employee's act causing appliance to become defective no defense, 1325.

    failure of pin lifter to open knuckles, 1360.

**Automatic couplers—Continued.**

defects—continued.

offense, use of coupler not necessary, 1360.

proximate cause of injury, 1361.

violation of statute, illustrations, 1341.

defects of original Safety Appliance Act, difficulty in enforcement, 1257.

different patterns of couplers, effect, 1350.

duties imposed by Safety Appliance Act, appliances must be operative, 1324.

employees between cars for other purposes, proximate cause of injury, Safety Appliance Act not violated, 1348.

employees entitled to protection of statute, proximate cause of injury, 1345.

engine and tender, coupler not required, 1360.

futility of state legislation requiring automatic couplers, 1251.

grab irons, provision of Safety Appliance Act, extension, 1364.

use for other purposes than coupling, protection of act, 1366.

handholds, substitutes unlawful, 1367.

injury to employees on duty, violation of statute not actionable, 1347.

instructions as to violation of statute, 1361.

interstate commerce, interurban electric railroads engaged in, 1296.

railroads in one state transporting freight, continuous shipment without traffic agreement with other carriers, 1295.

interstate employment not alleged, submission of case not error, 1421.

lever on other side of car, availability of lever no defense, 1358.

limitation of actions, amendments stating new cause of action, prohibition, 1423.

necessity at both ends of cars, 1354, 1355.

object of Congress in requiring, 1340.

order of Interstate Commerce Commission, 1604.

preparation for coupling, regulation, 1357.

reduction of injury, purpose of Congress in enacting Safety Appliance Act, 1265.

Safety Appliance Act as amended, text, 1593.

provision of Act, 1340.

statutory requirements, Ch. XLIV, 1339-1362.

steam hose not part of coupling, 1353.

switching, necessity of couplers, 1351.

trainmen on top of cars protected, 1346.

trolley cars, couplers not required, 1356.

violation of statute, failure of coupler to work under all circumstances as violation, 1343.

**Automobiles,**

"regulation" of interstate and foreign commerce, definition and explanation of power, 14.

**B.****Baggage,**

discrimination, auxiliary facilities at stations and terminal grounds, legality, 339.

baggage of passengers carried free, no discrimination, 419.

Hours of Service Act, carriers and employes subject to, 1434.

Interstate Commerce Act, text, 1514.

loss and damage, initial carrier's liability, object and purpose of enacting Second Cummins Amendment, 561.

rates, increase, order of director general of railroads, 1740.

regulations and rules, control of Commerce Commission, 290.

regulations concerning baggage to be published, 444.

stopping or interruption of shipments, interstate character not changed, 276.

**Baggagemen,**

interstate commerce, trainmen not engaged in, Employers' Liability Act, 857.

trainmen on interstate trains, 853.

negligence, facts held to show actionable negligence, Employers' Liability Act, 962.

**Banks,**

deposits, interstate commerce, transportation from one state to another as, 14.

**Baseball clubs,**

discrimination, sale of number of tickets at less rate than for single passenger, limitation to particular classes of persons unlawful, 425.

**Bastards,**

beneficiaries, Employers' Liability Act, 1059.

**Bills and notes,**

payment of freight charges with promissory notes, illegality, 480.

**Bills of lading,**

cash basis for charges, order of director general of railroads, 1706.

"common control, management or arrangement for a continuous carriage or shipment," definition and explanation of term in Interstate Commerce Act, 216.

Federal Act, Ch. XVIII, 609-623.

constitutionality of statute, 610.

leading provisions, 618.

origin and scope, 609.

text, 1557-1565.

interstate transportation,

change of destination in transit, 270.

method of proving engagement in, train and switching crews, Employers' Liability Act, 1221.

origin and destination of shipments, continuous carriage, illustrations, 265.

**Bills of lading—Continued.**

interstate transportation—continued.

point of shipments, reshipments from delivery, interstate character of shipment not changed, Employers' Liability Act, 770.  
railroads in one state transporting freight, continuous shipment without traffic agreement with other carriers, Safety Appliance Act, 1293, 1294.

re-billing not controlling in determining character of shipment, Safety Appliance Act, 1301.

temporary stopping or interruption of shipments, interstate character not changed, 276.

transportation for express companies, Safety Appliance Act, 1304.

limitation of liability,

contract against carrier's own negligence, invalidity, stipulation filed with Commission, 578.

contract with initial carrier, connecting carrier benefited, 607.

validity as to property other than live stock, Cummins Amendments, 567.

value at place of shipment, 606.

loss and damages, initial carrier's liability,

action by "lawful holder" of bill of lading, 584.

bill of lading governing transportation, second bill void, 585.

bill of lading not issued, effect, 583.

Carmack Amendment, 528.

law prior to Carmack Amendment, 536.

money paid to shipper by initial carrier, binding effect on other carriers in absence of fraud, 552.

purpose of enactment, 538.

state law superseded, 541.

stipulations exempting from liability, invalidity, 540.

change of destination or re-routing, effect, 604.

common law rules imposed by amendments to Interstate Commerce Act, 572.

contracts against loss by fire not due to negligence, 576.

Cummins Amendments,

causes leading to enactment, agreed valuation clause in bill of lading, notice of loss, 558.

effect of Second Cummins Amendment, 560.

no retroactive effect, 563.

object and purpose of enacting Second Cummins Amendment, 561.

reservation of remedies, effect of statute, 579.

damage by connecting carrier, Carmack Amendment to Interstate Commerce Act, 168.

damage for delay, Cummins Amendments, 587.

full damage to live stock, Cummins Amendment, 565.

rates,

publication and filing, privileges furnished shippers and not specified in schedule unlawful, 444.

**Bills of lading—Continued.**

rates—continued.

state statutes superseded by rates under Interstate Commerce Act, validity of rates as to intrastate shipments, 78.

route of interstate freight, duty of carriers to route as directed by shippers, amendment to Interstate Commerce Act, 193.

route of through shipments, right to route beyond carrier's terminal, 337.

terminal and belt railroads, subjection to Interstate Commerce Act, 234.

text of Interstate Commerce Act, 1542.

Twenty-Eight-Hour Live Stock Law, extension of time, written request of owner, 1488.

**Blacksmith,**

interstate commerce, repair of engines in roundhouses, Employers' Liability Act, 843, 845, 847.

**"Blow-Post" Law,**

speed of trains, invalidity of statute as burdening interstate commerce, 88.

**Board of Adjustment,**

order of director general of railroads, 1692, 1748.

**Boiler Inspection Act,**

Ch. LIII, 1491-1501.

appeal from decision of inspector, rights of carrier, 1494.

carrier's duties and obligations, 1492.

Chief Inspector, appointment by President, 1492.

district inspectors, duties, enforcement of statute, 1494.

districts, creation, fifty inspection districts created, 1493.

duty created, nature, 1496.

employe, definition, 1498.

employees subject to, 1491.

extension of statute, Amendment of 1915, 1499.

headlights, state laws superseded by Act as amended, 1500.

orders of Interstate Commerce Commission, 1640-1688.

railroad, definition, 1498.

railroads subject to, 1491.

reports, annual report by Chief Inspector to Interstate Commerce Commission, 1499.

sworn reports of carriers, filing, 1499.

reports of accidents,

damage suits, reports not to be used, 1498.

filing by carriers, 1497.

publication by Interstate Commerce Commission, 1498.

rules and regulations, adoption and enforcement, 1495.

text, 1635-1639.

violation of statute,

contributory negligence, damages not reduced, action under Employers' Liability Act, 1048.

penalties, 1498.

**Bonds,**

- fideliity bonds, change of premiums, order of director general of railroads, 1772.
- valuation of property of carriers, duty of Interstate Commerce Commission under Act of 1913, 195.
- war, federal control of carriers during war with Germany, purpose of enactment, 115.
- statute, 114.

**Brakeman injured or killed,**

- air brakes, former and present requirements, Safety Appliance Act, 1328.
- coupling cars,
  - assumption of risk, common law rule, carrier's liability, 1252.
- automatic couplers,
  - defect as proximate cause of injury, 1361.
  - trainmen on top of cars protected, 1346.
  - violation of Safety Appliance Act, illustrations, 1341.
- contributory negligence, choosing dangerous way to uncouple cars, instructions held erroneous, 1412.

**Employers' Liability Act,**

- assumption of risk,
  - application, analysis of federal decisions, 996.
  - confusing with contributory negligence, instructions, 1012.
  - employees held not to have assumed risk, 1024, 1026.
- death,
  - contributions by deceased, necessity of showing, 1093, 1100.
  - parties, ancillary administrator may sue, 1175.
- election, cause of action under state law and Federal Act, motion to elect before trial, sustaining, 1231.
- evidence held not to show actionable negligence, 972.
- evidence held to show actionable negligence, 967.
- injury caused by servant acting within scope of employment, necessity, 940.
- interstate commerce, evidence held not sufficient to show, 1224.
- interstate employes,
  - going to and from work, employes on premises, 784.
  - loading and unloading freight, 901.
  - material and supplies, procuring for interstate trains, 894.
  - switching crews, illustrations, 891.
  - switching interstate cars into or out of interstate trains, 867, 871.
  - trainmen, beginning and end of federal control, 863.
  - trainmen not engaged in interstate commerce, 857.
  - trainmen on interstate trains, 853.
  - transportation of employe's own property not subject to act, 796.
- liability of railroad, statute not limited to acts of fellow-servants at common law, 924.
- petition, allegation as to engagement in interstate commerce held sufficient, 1197.

**Brakeman injured or killed—Continued.****Employers' Liability Act—continued.**

proximate cause, carrier's liability for injury due in whole or in part from negligence, 957.

**Safety Appliance Act,**

air brakes, necessity of operation, hand brakes prohibited, 1334.  
duty of carriers, maintenance as well as equipment, necessity, 1368, 1371.

grab irons, use for other purposes than coupling, protection of act, 1366.

hand brakes, application of act to switching, 1372.

handholds, requirement of original act, 1363.

knowledge of defect by employe, suit not barred, 1402.

limitation of actions, amendments stating new cause of action, prohibition, 1423.

**Brakes,**

agitation for safety appliances on all cars, 1260.

**air brakes,**

duty to repair absolute, 1338.

failure to equip with, contributory negligence as defense, 1409.  
former and present requirements, Safety Appliance Act, 1328.

movements between yards as distinguished from movements in yards, transfer trains, 1331.

necessity, interurban electric trains, 1332.

necessity of operation, hand brakes prohibited, 1334.

recovery for injury caused by collisions, failure of brakes to work, 1333.

requirements of Safety Appliance Act, Ch. XLIII, 1328-1338.

statute not applicable to switching, 1329.

"trains" within Safety Appliance Act, what constitutes, 1330.

Amendments of 1903 to Safety Appliance Act, summary, 1259.

causes of enactment of original Safety Appliance Act, 1253.

common law rule, carrier's liability, 1252.

construction of Safety Appliance Act, custom of railroad, effect in construing, 1267.

defective cars, right of carrier to refuse defective cars supplied by connecting lines, Safety Appliance Act, 1326.

drawbars, height, order of Interstate Commerce Commission, 1376.  
hand brakes.

application of Safety Appliance Act, switching, 1372.

carrier's duty, Safety Appliance Act, Ch. XLV, 1363-1375.

maintenance as well as equipment, necessity, 1368, 1371.

duty to furnish mandatory, 1368.

necessity, Safety Appliance Act, 1365.

effect of order of Interstate Commerce Commission, 1373.

foreign and domestic cars, no distinction, 1367.



**Brakes—Continued.**

Interstate Commerce Commission,  
  authority to standardize appliances, Amendments of 1910 to Safety  
  Appliance Act, 1260.  
  order increasing percentage of cars to be equipped with air  
  brakes, 1258.  
  orders as to dimensions, number of appliances, etc., 1599, 1653.  
  purpose of Congress in authorizing Commission to prescribe stand-  
  ard equipment, 1375.  
  standardization order as to appliances, 1262.  
interstate commerce, interurban electric railroads engaged in, Safety  
  Appliance Act, 1296.  
knowledge of defect not required, Safety Appliance Act, 1371.  
provisions of original Safety Appliance Act, summary, 1255.  
Safety Appliance Act as amended, text, 1593.

**Bridges,**

  assumption of risk, employes held to have assumed risk, Employers'  
  Liability Act, 1018.  
  common carriers, bridge companies subject to Interstate Commerce  
  Act, 226.  
  Hours of Service Act, carriers and employes subject to, 1434.  
  interstate employment, Employers' Liability Act,  
    bridge workers, 814.  
    construction work, future use in interstate commerce, 810.  
    erection of foundation for new bridge under old bridge used for  
    interstate commerce, 818.  
    iron worker carrying material to repair bridge, 815, 818.  
    painters, 849.  
    petition, allegation held sufficient, 1197.  
    removing bolts from timbers taken from interstate bridges, 819.  
  "railroad" including bridges,  
    Employers' Liability Act, 739.  
    Hours of Service Act, 1444.  
    Interstate Commerce Act, 226, 300.  
  rates, differentials between cities on opposite banks of rivers crossed  
  by expensive bridges, reasonableness of rates, 395.  
  street railroad crossing state line, subject to Interstate Commerce  
  Act, 230.

**Briefs,**

  Interstate Commerce Commission, rules governing, 674, 681, 1582,  
  1585.

**Brokers,**

  discrimination, collection of private charges, assistance by carrier,  
  refusal of service to other shippers, 368.  
  interstate commerce, transportation from one state to another as  
  element, goods transported, 12.  
  telegraph messages, "ticker service," not subject to regulation by  
  state, 104.

**Building contracts,**

- charges to capital account of railroads, order of director general of railroads, 1691.
- discrimination, rates, deduction to pay shippers for building tie hoists, 370.
- interstate employees, Employers' Liability Act,
  - construction and repair work, Ch. XXIV, 809-852.
  - distinction, 813.
  - construction work, future use in interstate commerce, 810.
  - repair and machine shops, roundhouses and other buildings, 836, 840.
  - repair of buildings, depots and roundhouses, employment not interstate, 835.
  - switching crews, cars loaded with lumber for repair and construction work, 890.
- rates, publication and filing, changes permitted, private duties of carriers, 482.

**Buildings,**

- Hours of Service Act, telegraph offices, two offices in one community as one "place," 1469.

**C.****Car repairer injured or killed,**

- action under Employers' Liability Act,
  - engagement in interstate commerce, 841.
  - cars and engines used only in interstate commerce, 849.
  - employment not interstate, 847.
  - shopmen in terminal yards, 843, 845, 847.
  - switching crews, cars loaded with lumber for repair and construction work, 890.
  - temporary delay, 842.
- evidence held not to show actionable negligence, 969.
- evidence held to show actionable negligence, 968.

**Carmack Amendment,**

- Ch. XV, 528-554; Ch. XVII, 571-608.
- amendments, modification, First and Second Cummins Amendments, Ch. XVI, 555-570.
  - text, 555.
- common carriers, express companies, subjection to Interstate Commerce Act, Hepburn Amendment, 257.
- initial carrier's liability,
  - common law rules imposed by amendments to Interstate Commerce Act, 572.
  - delay and act of God destroying property, federal rule as to negligence, 595.
  - quantum of proof, necessity to establish liability, 594.
- liability of initial carrier for loss and damage by connecting carrier, 168.

**Carmack Amendment—Continued.**

state laws superseded by Carmack Amendment, 79.

**Carpenters,**

action under Employers' Liability Act,

engagement in interstate commerce, 814, 909.

evidence held to show actionable negligence, 965.

interstate commerce, method of proving engagement in, 1223.

petition, allegation as to engagement in interstate commerce held sufficient, 1197.

repair of buildings, depots and roundhouses, employment not interstate, 835.

repair of cars, employment not interstate, 847.

**Carriers,**

see EMPLOYERS' LIABILITY ACT; RAILROADS.

accident reports see title ACCIDENTS.

accounting, federal control of railroads, order of director general, 1697, 1752, 1754.

accounts, discontinuance, order of director general of railroads, 1701.

accounts, records and memoranda, control of Commerce Commission, 656.

Hepburn Act, 185.

animals, transportation, see ANIMALS; TWENTY-EIGHT-HOUR LIVE STOCK LAW.

answers, rules of Commerce Commission, 676.

appliances, see AUTOMATIC COUPLERS; BRAKES; CARS; SAFETY APPLIANCE ACT, etc.

applications of carriers, relief by Interstate Commerce Commission, 675.

rules of Commission, 1584, 1585.

apportionment of revenues, order of director general of railroads, 1702, 1769.

ash pans, see LOCOMOTIVES.

assumption of risk under Employers' Liability Act, Ch. XXVIII, 978-1027.

assumption of risk under Safety Appliance Act, Ch. XLVIII, 1400-1415.

automatic couplers, statutory requirements, Safety Appliance Act, Ch. XLIV, 1339-1362.

baggage, see BAGGAGE.

belt lines, interstate status, Safety Appliance Act, 1290.

beneficiaries under Employers' Liability Act, Ch. XXX, 1053-1060.

bills of lading, see BILLS OF LADING.

Board of Adjustment, order of director general of railroads, 1692, 1748.

boiler inspection, see BOILER INSPECTION ACT.

carload freight, Commerce Commission may not compel receipt and switching to industries on carrier's terminals, 649.

## Carriers—Continued.

- classification of freight,
  - application of carload rates, goods belonging to several owners, charges to be similar, 410.
  - controlling considerations, action by Interstate Commerce Commission, 402.
  - differential between carload lots and lesser amounts, legality of rates, 407.
  - excessive rates prohibited, 409.
  - differential between raw material and manufactured products, no discrimination, 405.
  - discrimination, advantage to particular kinds of traffic, Ch. XI, 399-417.
  - distinction between property, competition, 403.
  - duty of Interstate Commerce Commission, 401.
- necessity, 399.
- text of Interstate Commerce Act, 1514.
- uniform classification, effect of Interstate Commerce Act, 400.
- commerce court, Interstate Commerce Commission, amendment to statute giving additional remedies, 187.
- common carriers,
  - Ash Pan Act, receivers as "common carriers," 1503.
  - common law definition, 202.
  - federal jurisdiction over water carriers, extension by Panama Canal Act of 1912, 218, 220.
  - Interstate Commerce Act, application, 205.
  - common arrangement by ferry company with carrier by rail, 214.
  - definition, text of Interstate Commerce Act, 1513.
  - distinction from industrial railways, plant facilities, 203.
  - electric interurban railroads, engaging in interstate commerce, 233.
  - logging roads, 238.
  - stock yards company, transfer of live stock between pens and tracks of trunk lines, 236.
  - terminal and belt railroads, 234.
  - transportation from United States to adjacent foreign countries, 210.
- Safety Appliance Act, application, 1285.
- interurban electric trains, 1332.
- complaints to Commerce Commission, who may make, 664.
- connecting carriers, liability of railroad for condition of foreign cars, Safety Appliance Act, 1325.
- right of carrier to refuse defective cars supplied by connecting lines, 1326.
- connection between railroads and water carriers, establishment by Commerce Commission, 658.

## Carriers—Continued.

- contracts, duties imposed by Safety Appliance Act not to be evaded, 1323.
- duties not assignable, 1325.
- contracts prohibited by Federal Employers' Liability Act, Ch. XXXII, 1131-1136.
- contributory negligence under Employers' Liability Act, Ch. XXIX, 1028-1052.
- contributory negligence under Safety Appliance Act, Ch. XLVIII, 1400-1415.
- corporations incorporated in foreign countries, subjection to Interstate Commerce Act, 260.
- courtesy of employes, order of director general of railroads, 1777.
- damages for violation of Interstate Commerce Act, actions, pecuniary loss must be shown, 502.
- jurisdiction of courts and commission, Ch. XIV, 484-527.
- damages under Employers' Liability Act, Ch. XXXI, 1061-1130.
- death, see DEATH BY WRONGFUL ACT.
- delay in transportation, damages, regulations of Congress, common law of state courts superseded, 60.
- drawbars, statutory requirements, Safety Appliance Act, Ch. XLVI, 1376-1384.
- elections, prohibition from participation in, order of director general of railroads, 1782.
- Elkins Act, text, 1553-1556.
- employes,
  - compensation,
    - Adamson Law, Ch. LVI, 1507-1509.
      - commission to observe, appointment by President, 1508.
      - reduction of wages pending report of commission prohibited, 1508.
    - text, 1674.
  - increases, order of director general of railroads, 1709-1734.
  - supplementary orders of director general, 1756-1769.
- free passes, prohibition of giving of passes by Hepburn Act, exceptions, 181.
- order of director general of railroads, 1683.
- text of Interstate Commerce Act, 1515, 1543.
- Hours of Service Act, Ch. LI, 1431-1446.
- hours of service, federal and state control, 1432.
- carriers and employes subject to, 1434.
- continuity, breaking of, brief periods off duty, 1450.
- relief from duty for definite period, 1453.
- evasion of statute, statute may not be violated by requiring different service after statutory period, 1446.
- excuses and exceptions, 1470-1486.
- limitations upon hours of service, 1447-1470.
- employes engaged in or connected with movement of trains, 1447.

**Carriers—Continued.****employees—continued.**

- employees "on duty," commencement and termination of service, 1448.
- tower men and switch tenders, 1462.
- penalties, violation of statute, 1444.
- separate penalty for each employe kept on duty beyond statutory period, 1444.
- purpose of Congress in enactment, 1442.
- relief crews, duty to substitute, prevention of excessive hours, 1454.
- separate periods of service, statutory period not exceeded, 1468.
- telegraph offices, two offices in one community as one "place," 1469.
- text of act, 1633-1634.
- validity, 1437.
- classification of operators, statute not invalid, 1439.
- watching locomotive as being "on duty," fireman engaged in movement of trains, 1458.
- when statute is not applicable, 1471.
- regulations of Congress, validity, necessity of connection with interstate commerce, 51.
- subjection to Boiler Inspection Act, 1491.
- subjection to Employer's Liability Act,
  - abandonment of work, effect, 795.
  - act may constitute interstate employment in one relation and not in another, 778.
  - application of decisions construing Safety Appliance Act, 800.
  - carriers subject to Liability Act, Ch. XXII, 738-773.
  - carriers engaged in foreign commerce, 749.
  - carriers within territories, 758.
  - carrying passengers only, 754.
  - railroads, vessels or ships not parts of railroad systems, 754.
  - receivers of railroads, 756.
- construction and repair work, Ch. XXIV, 809-852.
- construction work, future use in interstate commerce, 810.
- effect of employment in both intrastate and interstate commerce, 783.
- employees engaged in interstate commerce, general principles, Ch. XXIII, 774-808.
- employment not limited to actual transportation to another state, 778.
- erroneous decisions holding employment to be interstate, 806.
- erroneous decisions holding employment to be intrastate, 803.
- evidence, Ch. XXXVII, 1219-1226.
- fellow-servant rule, abolition as to interstate employes, 736.
- general rule as to when railroad is engaged in interstate and foreign commerce, 738.

**Carriers—Continued.**

## employees—continued.

- going to and from work, employees on premises, 784.
- employment in intrastate and interstate commerce, 790.
- interurban electric railroads, 752.
- invalidity, Act of 1906, 691.
- jurisdiction of state and federal courts, Ch. XXXIV, 1145-1169.
- lessor of railroad, 750.
- limitation of act to interstate employees, 774.
- limitation provisions, Ch. XXXIII, 1137-1144.
- miscellaneous employees, 894-910.
- negligence under, Ch. XXVII, 911-977.
- parties, actions, Ch. XXXV, 1170-1178.
- parties defendant, agents and servants causing injury, non-liability, 1177.
- pleadings, XXXVI, 1179-1218.
- presumption, 781.
- prior or subsequent employment immaterial, 782.
- purpose of enactment, uniformity and modification of common law, 706.
- railroad wholly within single state, 742.
- scope, 702.
- tap lines and logging roads, 740.
- temporary cessation of work, effect, 795.
- termination of work, sleeping in cars, 792.
- tests adopted by United States Supreme court, 779.
- text of statute as amended, 1590-1592.
- train and switching crews, Ch. XXV, 853-893.
- transportation by private carrier not subject to act, 796.
- validity, Act of 1908, 694.
- evidence of interstate shipments, orders of Interstate Commerce Commission, statutory provisions, Employers' Liability Act, 1220.
- explosives, interstate transportation, federal control, 298.
- regulations, Commerce Commission may formulate, 655.
- text of federal statute, 1676.
- express companies not common carriers, Employers' Liability Act, 757.
- subjection to Interstate Commerce Act, Hepburn Amendment, 255.
- federal control, railroads wholly within state, character of transportation, interstate shipments, 207.
- common arrangement for transportation with other carriers, immunity, 206.
- scope, historical review, effect of Interstate Commerce Act, 137.
- federal treasurers, duties, order of director general of railroads, 1772, 1774.
- hearing before Commerce Commission, place of holding, 678.
- witnesses, Commission may compel attendance and testimony, 679.

## Carriers—Continued.

- imports from foreign states, immunity from state legislation, protection of commerce clause, 19.
- information relating to business of interstate shippers, prohibition against carriers and agents giving, 194.
- inspection, boilers, see LOCOMOTIVES.
- Interstate Commerce Act, see INTERSTATE COMMERCE ACT.
- "interstate commerce" as used in Federal Constitution, definition, 8.
- Interstate Commerce Commission, see INTERSTATE COMMERCE COMMISSION.
- interstate transportation,
  - absence of definite destination, immateriality, 269.
  - all stages of shipment, regulation of terminal charges, services, and facilities, 283.
  - applicability of Employers' Liability Act, statutory rules, 717.
  - beginning and ending, Employers' Liability Act, 760.
  - carriers engaged in, cars used in, Safety Appliance Act, Ch. XLI, 1283-1305.
  - carriers subject to Interstate Commerce Act, Ch. VI, 200-261.
  - change of destination in transit, 270.
  - common arrangement of carrier by water with carrier by rail, subjection to Interstate Commerce Act, 211.
  - destination in same state, passage through another state, Employers' Liability Act, 766.
  - evidence of employment in interstate commerce as evidence of railroad engaging in interstate commerce, Employers' Liability Act, 772.
  - grain elevation service, regulation under federal control, 286.
  - immunity from state legislation, commencement and termination of protection of commerce clause, original packages, 23.
  - Interstate Commerce Act not applicable to all interstate commerce, 300.
  - loading, dunnage, and special preparation of freight cars for shipment, duties of shippers, 287.
  - origin and destination of shipments, continuous carriage, 263, 265.
  - peddling from cars, carriers not compelled to furnish peddling service, 299.
  - receipt and delivery of goods, inclusion in transportation, 272.
  - refrigeration and ventilation of cars, duty of carriers, 291.
  - reshipments from point of delivery, change of interstate character of shipment, 767.
  - sales, coal, delivery F. O. B. at mine for transportation to purchaser outside of state, 279.
  - shipment from one foreign country to another foreign country, passage through United States, not subject to Interstate Commerce Act, 282.
  - shipment from one state to port in same state, transshipment for exporting, 281.



**Carriers—Continued.**

interstate transportation—continued.

shipments passing through another state, destination in state of origin of shipment, 267.

state and federal control, general principles governing control, 37, 41.

respective powers over common carriers, Ch. II, 35-107.

state control, delivery of cars for interstate shipment, state regulations superseded by Hepburn Act, 75.

extent of power over intrastate commerce, 68.

internal affairs, invalidity of federal laws and regulations encroaching upon state's power, 49.

state laws on same subject superseded, 55.

switching service at ports, imported goods, 297.

temporary stopping or interruption of shipments, change into intrastate commerce, 273.

interstate character not changed, 276.

track storage and demurrage charges, control of Commerce Commission, 294.

transit privileges, control of Interstate Commerce Commission, 285.

transportation from one state to another as essential element, 10.

transportation of company property over state lines, Safety Appliance Act, 1304.

transportation passing through another state to point in same state, Safety Appliance Act, 1298.

transportation wholly in one state not subject to Interstate Commerce Act, 285.

transporting freight, continuous shipment without traffic agreement with other carriers, Safety Appliance Act, 1293, 1294.

weighing of shipments of freight, federal control under Interstate Commerce Act, 290.

wharves and connecting tracks, federal control under Interstate Commerce Act, 295.

inventory, order of director general of railroads, 1687.

investigation by Interstate Commerce Commission, 1536.

accidents, reports, 663.

power to proceed when Commerce Commission acts on its own motion, 668.

limitation of liability,

causes leading to enactment of Cummins Amendment to Carmack Amendment, agreed valuation clause in bill of lading, notice of loss, 558.

contract against carrier's own negligence, invalidity, stipulation filed with Commission, 578.

contract with initial carrier, connecting carrier benefited, 607.

Cummins Amendment, no retroactive effect, 563.

**Carriers—Continued.**

## limitation of liability—continued.

notice of claims, regulation by 'statute, Cummins Amendment, 568.

text of Interstate Commerce Act, 1543.

validity as to property other than live stock, 'Cummins Amendments, 567.

value at place of shipment, 606.

## loss and damage,

burden of proof, regulations of Congress, common law of state courts superseded, 60.

carrier's liability as warehouseman, nature, 593.

carrier's liability at common law, exceptions exempting carriers, 574.

connecting and terminal carrier's liability, Carmack Amendment to Interstate Commerce Act, 598.

no liability for initial carrier's act, 600.

damages for violation of Interstate Commerce Act, authority of Commission, extension only to violations of act, 490.

fraudulent claims against carriers penalized, amendment to Interstate Commerce Act, 189.

## initial carrier's liability,

action by "lawful holder," of bill of lading, 584.

bill of lading governing transportation, second bill void, 585.

bill of lading not issued, effect, 583.

burden of proof to establish liability or defenses, 594.

delay and act of God destroying property, 595.

Carmack Amendment to Interstate Commerce Act, 168; Ch. XV. 528-554.

action against connecting carrier barred by recovery against initial carrier, 553.

action in domicile of terminal carrier prohibited, 550.

enforcement by state courts, 548.

federal decisions, controlling effect in construing statute, 547.

law prior to Carmack Amendment, 536.

money paid to shipper by initial carrier, binding effect on other carriers in absence of fraud, 552.

presumption of negligence against initial carriers, 601.

purpose of enactment, 538.

quantum of proof, necessity to establish liability, 594.

removal of actions in state courts, 549.

state laws superseded, 79, 541.

stipulations exempting from liability, invalidity, 540.

validity, 531.

change of destination or re-routing, effect, 604.

commencement of duties, delivery of property for transportation, 581.

**Carriers—Continued.**

loss and damage—continued.

- common law rules imposed by amendments to Interstate Commerce Act, 572.
- contracts against loss by fire not due to negligence, 576.
- Cummins Amendments, text, 555.
  - carriers affected by, 563.
  - causes leading to enactment of, 558.
  - damage for delay, 587.
  - effect of Second Cummins Amendment, 560.
  - export and import shipments to and from foreign countries not adjacent to United States, 570.
  - full damage to live stock, 565.
  - interurban railroads subject to, 565.
  - no retroactive effect, 563.
  - object and purpose of Second Cummins Amendment, 561.
  - reservation of remedies, effect of statute, 579.
- delay and act of God destroying property, federal rule as to negligence, 595.
- presumption of negligence of terminal carriers, conflict of decisions, 600.
- property held by terminal carriers as warehouseman, 592.
- wrongful delivery by terminal carriers as "loss," 591.
- payment of claims, order of director general of railroads, 1779-1781.
- municipal ordinances, regulation of carriers, passenger rates, invalidity, 67.
- negligence, violation of Safety Appliance Act as negligence per se, 1306.
- officers limited, order of director general of railroads, 1687.
- orders, general orders of director general of railroads, 1678-1783.
- orders of Interstate Commerce Commission, boiler inspection, 1640-1688.
  - enforcement, service, duties of carriers, 683.
  - safety appliances, 1598-1632.
- passengers,
  - fares, see RATES AND CHARGES.
  - imports from foreign states, immunity from state legislation, protection of commerce clause, 19.
  - unjust discrimination and unlawful preference, Ch. XII, 418-429.
    - baggage of passengers carried free, no discrimination, 419.
    - colored passengers, separation from white persons not unlawful, 420.
  - Interstate Commerce Act applies to passengers, 418.
- pipe line companies, transportation of companies' own commodity, subjection to Interstate Commerce Act, 241.
- transportation of oil and other commodities, subjection to Interstate Commerce Act, 241.

**Carriers—Continued.**

- point of shipments, reshipments from delivery, interstate character of shipment not changed, Federal Employers' Liability Act, 770.
- practice under Federal Employers' Liability Act, Ch. XXXVIII, 1227-1248.
- procedure before Interstate Commerce Commission, Ch. XX, 664-686.
- prohibition from owning or having interest in freight transported, amendment to Interstate Commerce Act, Commodity Clause, 175.
- purpose, scope, validity and construction of Safety Appliance Act, Ch. XL, 1264-1282.
- rates, see title RATES AND CHARGES,
- rebates, text of Interstate Commerce Act, 1516.
- prohibition, Elkins Act of 1903, 164.
- receivers of railroads, purchasers of property, subjection to Interstate Commerce Act, 259.
- records, interstate commerce, method of proving engagement in, Employers' Liability Act, 1221.
- regulations,
  - authority of Congress, regulation of duties of interstate carriers, scope of power, 147.
  - definition and explanation of power, 14.
  - federal and state control during war, Ch. III, 108-133.
  - state control, operation of trains between intrastate points, limitations and exceptions to power of state, 82.
  - payment for transportation by advertising, invalidity of state statute, 81.
  - speed of trains, signals, stopping of trains, absence of legislation by Congress, 86.
  - switch connections with private side tracks, power of state to compel, intrastate business, 77.
- relation of discrimination clause of Interstate Commerce Act to Elkins Act of 1903, 314.
- reports,
  - Accident Reports Act, 1505.
  - annual reports by carriers, Commerce Commission may require, 661.
  - Boiler Inspection Act, 1497, 1499.
  - Hours of Service Act, 1440.
  - monthly reports by carriers to Commerce Commission required, 661.
  - text of Interstate Commerce Act, 1539.
  - weekly cash report, order of director general of railroads, 1705.
- route of interstate freight, duty of carriers to route as directed by shippers, amendment to Interstate Commerce Act, 193.
- Safety Appliance Act, see SAFETY APPLIANCE ACT.

**Carriers—Continued.**

- safety appliances, power of Interstate Commerce Commission, 662.
- regulations of Congress, intrastate subject matters, valid regulations, 54.
- subject matter covered, difficulty of defining, 57.
- schedules, text of Interstate Commerce Act, 1519.
- shipments and transportation services controlled by Interstate Commerce Act, Ch. VII, 262-301.
- shipments, privileges, order of director general of railroads, 1775.
- sleeping car companies, not common carriers by, railroad, Employers' Liability Act, 756.
- subjection to Interstate Commerce Act, Hepburn Amendment, 258.
- stock yard companies, interstate status, Safety Appliance Act, 1290.
- street railroads, crossing state line, subject to Interstate Commerce Act, 230.
- not subject to Federal Employers' Liability Act, 755.
- switch connections, power of Interstate Commerce Commission to order, 655.
- connection with private side tracks and lateral branch lines, Hepburn Act, 171.
- telegraph, telephone and cable companies, federal control, subjection to Interstate Commerce Act, 245.
- terminal railroads, interstate status, Safety Appliance Act, 1290.
- "transportation," Interstate Commerce Act extended by Hepburn Act, 167.
- term as used in Interstate Commerce Act, 300.
- text of Interstate Commerce Act, 1514.
- valuation of property of interstate carriers, duty of Interstate Commerce Commission, under Act of 1913, 195.
- war,
  - commodities essential to national defense, President authorized to direct movement of, 198.
  - federal control during war with Germany, effect of statute upon other federal and state laws, 127.
  - federal statute, 114.
  - penalty for violation of federal statute, 132.
  - President's assumption of control, proclamation of 1916, 109.
  - purpose of enactment, 115.
  - rates for transportation, authority of President to fix, 128.
  - right to sue carriers under federal control, 129.
  - termination of federal control under statute, 133.
  - text of statute, 1566-1574.
  - obstruction of movement of interstate commerce as crime, Amendment of 1917 to Interstate Commerce Act, 197.
  - power of Congress over carriers during time of war and time of peace, distinction, 108.
  - President's power to control transportation systems in time of war, 109.

**Carriers—Continued.**

water lines, Commerce Commission may authorize railroads to continue ownership, 652.

**Cars,**

agitation for safety appliances on all cars, 1260.

air brakes,

failure to equip with, contributory negligence as defense, 1409.

former and present requirements, Safety Appliance Act, 1328.

statute not applicable to switching, Safety Appliance Act, 1329.

"trains" within Safety Appliance Act, what constitutes, 1330.

appliances,

duties imposed by Safety Appliance Act, appliances must be operative, 1324.

statutory duty to maintain appliances in secure condition, 1309.

assumption of risk,

distinction from contributory negligence, Safety Appliance Act, 1403.

no defense, violation of Safety Appliance Act, 1400.

automatic couplers, under Safety Appliance Act,

actions for injuries, exhibition of model couplers, 1362.

application of act, coupling and uncoupling, 1352.

application to act to all cars, 1351.

common law rule, carrier's liability, 1252.

defect as proximate cause of injury, 1361.

defects, failure of pin lifter to open knuckles, 1360.

defects of original act, difficulty in enforcement, 1257.

different patterns of couplers, effect, 1350.

employees between cars for other purposes, proximate cause of injury, 1348.

engine and tender, coupler not required, 1360.

futility of state legislation requiring automatic couplers, 1251.

instructions as to violation of statute, 1361.

lever on other side of car, availability of lever no defense, 1358.

necessity at both ends of cars, 1354, 1355.

preparation for coupling, regulation, 1357.

proximate cause of injury, employees entitled to protection of act, 1345.

steam hose not part of coupling, 1353.

switching, necessity of couplers, 1351.

trainmen on top of cars protected, 1346.

trolley cars, couplers not required, 1356.

violation of act, illustrations, 1341.

failure of coupler to work under all circumstances as violation, 1343.

brakes, common law rule, carrier's liability, 1252.

order of commerce commission increasing percentage of cars to be equipped with air brakes, 1258.

**Cars—Continued.**

- caboose cars, order of Interstate Commerce Commission, safety appliances, 1615, 1617.
- cars and vehicles subject to Safety Appliance Act, 1280.
- causes of enactment of original Safety Appliance Act, 1253.
- Commerce Commission without authority to compel furnishing of special kinds of cars, 635.
- contributory negligence under Safety Appliance Act,
  - choosing dangerous way to uncouple cars, safe method available, 1409.
  - instructions held erroneous, 1412.
- distinction from assumption of risk, 1403.
- effect of Employers' Liability Act, 1404.
- employee engaged in intrastate commerce, 1406.
- going between cars to uncouple, employee held not negligent, 1414.
- no air brakes on logging trains, 1409.
- defective cars,
  - containing live stock or perishable freight, moving with chains, 1397.
  - employee's act causing appliance to become defective no defense, 1325.
  - hauling with defective appliances over other railroads penalty, 1282.
  - interstate employment not alleged, submission of case not error, 1421.
- movement, law prior to amendment, 1398.
- petition need not refer to Safety Appliance Act, 1420.
- pleading use of car in interstate commerce, 1421.
- proximate cause, defective equipment must be proximate cause, action for damages, 1326.
- right of carrier to refuse defective cars supplied by connecting lines, 1326.
- drawbars,
  - height,
    - decisions as to requirements of Safety Appliance Act, 1378.
    - delegation of authority as to height, validity, 1280.
    - duty not to be delegated or evaded, 1382.
    - instructions erroneous under old and new orders of Interstate Commerce Commission, 1379.
    - order of Interstate Commerce Commission, 1257, 1261, 1376, 1377.
  - necessity, application of Safety Appliance Act to locomotives, 1380
  - repair of cars, right to move in revenue trains or with other cars, 1391.
  - statutory requirements, Safety Appliance Act, Ch. XLVI, 1376-1384.
- duty of carriers, maintenance as well as equipment, necessity, Safety Appliance Act, 1368, 1371.
- duties not to be evaded by contract, 1323.
- duty to furnish, obligation as raising judicial question, Commission's powers administrative in character, 637.

## Cars—Continued.

duty to furnish, etc.—continued.

- damages for violation of Interstate Commerce Act, jurisdiction of state courts not wholly superseded, 501.
- empty cars, change of interstate character of shipment, Employers' Liability Act, 767.
- hauling empty cars as interstate commerce, Employers' Liability Act, 763.
- exception from requirements of Safety Appliance Act, 1385.
  - cars not subject to state laws, 1398.
  - cars on interurban railroads moving over street railroads, 1397.
  - strict construction of exceptions, 1396.
- exchange of cars, amendment to Interstate Commerce Act, 187.
- flat cars, order of Interstate Commerce Commission, safety appliances, 1608.
- foreign cars, liability of railroad for condition of Safety Appliance Act, 1325.
- freight trains, orders of Interstate Commerce Commission, safety appliances, 1631.
- gondola cars, order of Interstate Commerce Commission, safety appliances, 1604, 1607.
- grab irons required, Safety Appliance Act, 1365.
  - foreign and domestic cars, no distinction, 1367.
  - provision of Safety Appliance Act, extension, 1364.
- hand brakes,
  - application of Safety Appliance Act, switching, 1372.
  - duty to furnish mandatory, 1368.
  - maintenance as well as equipment, necessity, 1368, 1371.
  - necessity, 1365.
    - effect of order of Interstate Commerce Commission, 1373.
    - foreign and domestic cars, no distinction, 1367.
  - purpose of Congress in authorizing Commission to prescribe standard equipment, 1375.
- handholds,
  - duty to furnish mandatory, 1368.
  - extent of requirement of Safety Appliance Act, 1372.
  - necessity, effect of order of Interstate Commerce Commission, 1373.
    - foreign and domestic cars, no distinction, 1367.
  - substitutes unlawful, 1367.
  - purpose of Congress in authorizing Commission to prescribe standard equipment, 1375.
  - requirement of original Safety Appliance Act, 1363.
- hopper cars, order of Interstate Commerce Commission, safety appliances, 1606.
- interstate cars, Safety Appliance Act, Ch. XLI, 1283-1305.
  - car on switching track for repairs, 1302.
  - dining car used for interstate train on siding, 1303.
  - hauling empty cars over state lines, 1301.



**Cars—Continued.**

interstate cars, Safety Appliance Act, etc.—continued.

hauling in interstate trains, 1299.

preparation, switching cars in yards, 1300.

railroads in one state transporting freight, continuous shipment without traffic agreement with other carriers, 1293-1295.

requirement as to interstate character not necessary since 1903 Amendment, 1287.

requirement as to interstate character prior to 1903 Amendment, 1286.

transferring cars to industrial track, 1305.

Interstate Commerce Commission, authority to standardize appliances, Amendments of 1910, 1260.

purpose of Congress in authorizing Commission to prescribe standard equipment, 1375.

standardization order as to appliances, 1262.

intrastate and interstate cars, inclusion by Safety Appliance Act, as amended, 1270.

intrastate cars, relation to interstate commerce, Safety Appliance Act, 1274.

cars used on tracks other than main lines, 1277.

validity of amendment including, 1273.

ladders, extent of requirement of Safety Appliance Act, 1372.

necessity under Safety Appliance Act, 1365.

purpose of Congress in authorizing Commission to prescribe standard equipment, 1375.

limitation of actions, amendments stating new cause of action, prohibition, action under Safety Appliance Act, 1423.

loading and unloading, order of director general of railroads, 1684.

unloading pursuant to 28-Hour Live Stock Law, feeding animals at expense of owner, 1489.

moving, text of Interstate Commerce Act, 1539.

"necessary movement" for repairs, exception from Safety Appliance Act, 1386.

negligence, violation of Safety Appliance Act, evidence of negligence not required, 1320.

no distinction between passenger and freight cars, Safety Appliance Act, 1277.

operation of appliances, employe's failure to operate appliance no offense, Safety Appliance Act, 1324.

orders of Interstate Commerce Commission, safety appliances, 1598-1632.

passenger cars, order of Interstate Commerce Commission, safety appliances, 1619-1623.

penalties, violation of Safety Appliance Act, carrier's liability for each car hauled, 1425.

Porto Rico, applicability of Safety Appliance Act, 1281.

provisions of original Safety Appliance Act, summary, 1255.

**Cars—Continued.**

- purpose of Congress in enacting Safety Appliance Act, 1265.
- repairs,
  - burden of proof upon carrier, movement of cars for repairs, Safety Appliance Act, 1391.
  - movement for repairs, relief from penalty, liability for personal injuries not affected, 1396.
  - movement from repair point prohibited, 1389, 1390.
  - necessity of movement for repairs as question of fact, 1398.
  - repair at time of discovery of defect, necessity, Safety Appliance Act, 1388.
  - right to move in revenue trains or with other cars, 1391.
- rule prohibiting going between moving cars, effect, Safety Appliance Act, 1408.
- rules of carriers governing distribution and exchange, power of Interstate Commerce Commission, 642.
- rules of Interstate Commerce Commission, text of statute, 1547.
- running boards,
  - duty to furnish mandatory, 1368.
  - extent of requirement of Safety Appliance Act, 1372.
  - illustrations, violation of act, 1372.
  - necessity, Safety Appliance Act, 1365.
  - effect of order of Interstate Commerce Commission, 1373.
  - foreign and domestic cars, no distinction, 1367.
- Safety Appliance Act as amended, 1593 et seq.
  - application of remedial features of statute, cars moved for repairs, 1316, 1318.
  - duties imposed by statute in one relation not actionable in another, 1318.
  - exception from statute, cars and movements of cars, Ch. XLVII, 1385-1389.
  - remedial provisions not limited to employees, 1269.
- sill steps,
  - duty to furnish mandatory, 1368.
  - extent of requirement of Safety Appliance Act, 1372.
  - necessity, Safety Appliance Act, 1365.
  - effect of order of Interstate Commerce Commission, 1373.
  - foreign and domestic cars, no distinction, 1367.
  - purpose of Congress in authorizing Commission to prescribe standard equipment, 1375.
- state laws, safety appliances, invalidity as to cars of interstate railroads, 1278.
- substitution for appliances unlawful, Safety Appliance Act, 1312.
- tank cars, order of Interstate Commerce Commission, safety appliances, 1609, 1610, 1613.
- use in interstate traffic, materiality, Federal Employers' Liability Act, 1288.
- "use" of cars and "haul," distinction eliminated by 1903 Amendment, Safety Appliance Act, 1304.

**Cars—Continued.**

"used," extension of Safety Appliance Act to cars, etc., "used" on interstate highways, 1276.  
validity of original Safety Appliance Act, 1264.

**Cattle,**

see ANIMALS.

**Certiorari,**

appeal, writ of error, exclusion of remedy in certain cases, Federal Employers' Liability Act, 1156.

**Chains,**

defective cars containing live stock or perishable freight, moving with chains, Safety Appliance Act, 1397.

**Charities,**

free passes,

Amendment of 1889 to Interstate Commerce Act, 161.

prohibition of giving of passes by Hepburn Act, exceptions, 181.

text of Interstate Commerce Act, 1515, 1543.

**Cigarettes,**

see TOBACCO.

**Civil rights,**

passengers, discrimination, colored passengers, separation from white persons not unlawful, 420.

state control over internal affairs, invalidity of federal laws and regulations encroaching upon state's power, 49.

**Classification,**

Hours of Service Act, classification of operators, statute not invalid, 1439.

railroads, general order of director general of railroads, 1681.

**Coal,**

cars not furnished, damages for violation of Interstate Commerce Act, jurisdiction of state courts not wholly superseded, 501.

**discrimination,**

action for unlawful discrimination, evidence of injury, measure of damages, 320.

**rates,**

coal fields served by different carriers, 386.

different methods of loading not justification for different rates, 371.

different uses of commodities, different rates not justified, 413.

rates to other carriers as shippers, preferences prohibited, 359.

shortage of cars, equal distribution among shippers necessary, 342.

**interstate employees, Employers' Liability Act,**

act may constitute interstate employment in one relation and not in another, 778.

coal for engines, dumping into chutes and tenders, 900,

supplying and moving, 897.

**Coal—Continued.**

interstate employes, Employers' Liability Act—continued.

elevation of coal, 836, 840.

material and supplies, procuring for interstate trains, 894.

switching crews, termination of interstate journey, receipt by consignee, 884.

interstate shipments,

empty cars, reshipments from, point of delivery, change of interstate character of shipment, Employers' Liability Act, 767.

origin and destination of shipments, continuous carriage, illustrations, 265.

sales, delivery F. O. B. at mine for transportation to purchaser outside of state, 279.

temporary stopping or interruption of shipments, change into intrastate commerce, 273.

prohibition from owning or having interest in freight transported, amendment to Interstate Commerce Act, Commodity Clause, 175.

rates, increase, order of director general of railroads, 1744.

**Collection,**

discrimination, collection of private charges, assistance by carrier, refusal of service to other shippers, 368.

**Collisions,**

air brakes, recovery for injury caused by collisions, failure of brakes to work, Safety Appliance Act, 1333.

automatic couplers, injury to employes on duty, violation of Safety Appliance Act, 1347.

duties of carriers under Accident Reports Act, 1506.

employes engaged in interstate commerce, erroneous decisions holding employment to be interstate, Employers' Liability Act, 806.

Hours of Service Act, exceptions to statute, derailments and collisions, as "casualties," 1478.

investigation by Interstate Commerce Commission, Accident Reports Act, 1505.

power of Commerce Commission, 663.

**Combinations and monopolies,**

Interstate Commerce Act, causes leading to enactment of original act, 139.

original enactment, fundamental requirements, 152.

purpose of original enactment, reasonableness of rates, prevention of discrimination, 154.

**Commerce,**

see FOREIGN COMMERCE; INTERSTATE COMMERCE.

**Commerce clause,**

compensation, Adamson Eight-Hour Wage Law, validity, 1509.

master and servant, power of Congress to regulate, scope, nature and extent of power, 689.

**Commerce clause—Continued.**

Workmen's Compensation Act, state laws superseded by Employers' Liability Act, extent, 726.

**Commission,**

see INTERSTATE COMMERCE COMMISSION.

**Commodity clause,**

Interstate Commerce Act, amendments, Hepburn Act, carriers prohibited from having interest in freight transported, 175.

**Common law,**

assumption of risk under Employers' Liability Act,  
abolition or modification by state constitution and statutes, effect, 984.

conflict of decision, 979, 982.

defense to negligence of fellow-servants, 993.

determination, controlling effect of federal decisions, 986.

beneficiaries, "next of kin," determination by state law, Employers' Liability Act, 1058.

brakes, carrier's liability, 1252.

car couplers, carrier's liability, 1252.

comparative negligence, gross negligence of plaintiff and slight negligence of defendant, recovery not prevented, Employers' Liability Act, 1039.

contributory negligence, Employers' Liability Act,

apportionment of damages, manner, 1041.

modification, purpose of Congress, 1034.

pleading, necessity, determination by state law, 1050.

recovery not barred, 1029.

defects of equipment, negligence under Employers' Liability Act, 912.

discrimination and undue preferences, 304.

Employers' Liability Act, purpose of enactment, uniformity and modification of common law, 706.

former adjudication, commencement of action under state law not bar to suit under Employers' Liability Act, 1240.

initial carrier's liability for loss and damage by connecting carrier, Carmack Amendment to Interstate Commerce Act, 168.

Interstate Commerce Act, causes for enactment, inadequacy of common law remedies, 141.

common law of state courts superseded, 58.

regulation of rates; futile attempts of states to regulate, 145.

loss and damage by carriers,

Carmack Amendment, federal decisions, controlling effect in construing statute, 547.

purpose of enactment, 538.

common law rules imposed by amendments to Interstate Commerce Act, 572.

delay and act of God destroying property, federal rule as to negligence, 595.

**Common law—Continued.**

loss and damage by carriers—continued.

exceptions exempting carriers, 574.

law prior to Carmack Amendment, 536.

negligence, Employers' Liability Act,

criterion, ordinary care of railroads required, 914.

determination according to decisions of Federal courts, conflict of decision, 928.

final decision of Supreme court, 933.

evidence, sufficiency not governed by decisions of state courts, 949.

negligence of officers, agents or employes, abolition of fellow-servant rule, 912.

statute not limited to acts of fellow-servants at common law, 924.

Safety Appliance Act, violation causing injury as authorizing recovery under Employers' Liability Act, 921.

parent and child, recovery for loss of services, law superseded by Employers' Liability Act, 728.

petition, cause of action under state or common law, application of Employers' Liability Act may be raised by answer, 1203.

proximate cause, automatic couplers, employes entitled to protection of Safety Appliance Act, 1345.

rates, authority of Interstate Commerce Commission to prescribe through routes and joint rates, 176.

preferences between cities and localities permitted, 374.

publicity and permanency of rates at common law, 431.

removal of causes, petition stating cause of action under state statute and Employers' Liability Act, 1149, 1150.

switch connection with private side tracks and lateral branch lines, power of Interstate Commerce Commission to order, Hepburn Act, 171.

war, federal control and compensation of carriers during period of war with Germany, effect, 127.

**Competition,**

classification of freight, preferences, 403.

discrimination in rates,

competition between localities, qualifications of rule permitting different rates based on competition, 384.

rate resulting not unreasonable, 382.

difference in amount of traffic between similar localities, discriminatory rates and fares prohibited, 384.

**Compromise and settlement,**

Employers' Liability Act,

contracts, prohibition of act, release not a contract within statute, 1135.

death, damages recoverable, distribution, settlement by payment of lump sum, 1083.

**Compromise and settlement—Continued.****Employers' Liability Act—continued.**

settlement with one beneficiary, action by personal representative not defeated, 1128.

power of administrator to settle without court's consent, 1247.

relief fund, acceptance of benefits by employe, actions against joint tort-feasors not barred, 1134.

money only may be received for transportation by carriers, Interstate Commerce Act, 479.

**Compulsory Testimony Act,**

testimony before Interstate Commerce Commission, invalid provision of statute remedied by enactment of Compulsory Testimony Act, 162.

**Computation,**

method, increases of wages, order of director general of railroads, 1714, 1734.

**Conductors,**

actions under Employers' Liability Act,

assumption of risk, employes held not to have assumed risk, 1024.

engagement in interstate commerce, preparing trains for interstate movement, 860.

return trips by trains carrying out interstate freight, 865.

trainmen not engaged in interstate commerce, 857.

trainmen on interstate trains, 853.

evidence held not to show actionable negligence, 972.

evidence held to show actionable negligence, 962.

proximate cause, injury due solely to act of employe, no recovery, 961.

Hours of Service Act, continuity, breaking of, brief periods off duty, 1450.

employes subject to, 1434.

limitation upon hours of service, tower men and switch tenders, 1462.

**Conflict of laws,**

cars, exemption from Safety Appliance Act, cars not subject to state laws, 1398.

use in interstate traffic, materiality, Federal Employers' Liability Act, 1288.

contributory negligence as defense, application of state statutes abolishing defense, action under Safety Appliance Act, 1407.

evidence admissible under general denial, Employers' Liability Act, 1051.

pleading, necessity, determination by state law, Employers' Liability Act, 1050.

**Employers' Liability Act,**

assumption of risk, application of doctrine, analysis of federal decisions, 996.

**Conflict of laws—Continued.****Employers' Liability Act—continued.**

- defense to negligence of fellow-servants, 993.
- beneficiaries, "next of kin," determination by state law, 1058.
- death, damages recoverable, distribution controlled by Federal statute, 1082.
- demurrer to evidence, state law not controlling, 1220.
- effect upon state laws, exclusiveness of Federal Act, 721.
- election; cause of action under state law and Federal Act, motions to elect under Iowa statute, 1229.
- evidence, admissibility, testimony of widow or other beneficiaries, determination by law of forum, 1219.
- controlling effect of state law, 1219.
- negligence, sufficiency not governed by decisions of state courts, 949.
- former adjudication, commencement of action under state law not bar to suit under Federal Act, 1240.
- interstate commerce, applicability of Federal Act, statutory rules, 717.
- judgment notwithstanding verdict, power of state courts to direct, action under Federal Act, 1246.
- limitation, accrual of cause of action, death cases, 1142.
  - amendment setting up new cause of action not allowed, 1210.
  - amendments allowed after two-year period, 1215.
- parties, death cases, widow cannot sue although sole beneficiary, 1172.
- pleading,
  - cause of action under Federal Act, no recovery under state statutes, 1183.
  - cause of action under state law and Federal Act, different counts allowed, 1193.
  - cause of action under state law, evidence showing case under Federal Act, recovery prevented, 1204.
  - necessity of showing Federal Act, 1207.
  - recovery under Federal Act, omission supplied by answer, 1186.
  - harmless error, 1189.
- submitting case under state law, federal right not denied, 1165.
- sufficiency, state law controlling, 1197.
- presumption of negligence created by state statute not applicable to injury or death under Federal Act, 946.
- applicability of Mississippi statute to actions under Federal Act, 948.
- procedure, state laws, controlling effect, 733.
- verdicts, state laws permitting verdict by less than twelve, validity in actions under Federal Act, 1236.
- regulation of interstate and foreign commerce by Congress, necessity, conflict of state legislation, 3.



**Conflict of laws—Continued.**

regulation of interstate and foreign commerce, etc.—continued.

state laws on same subject superseded, 55.

state laws, punishment of crime against two sovereignties, rule not applicable, Safety Appliance Act, 1279.

**Conflicting decisions,**

assumption of risk under Employers' Liability Act, 979, 982.

controlling effect of federal decisions, 986.

construction of Employers' Liability Act, decisions of Federal Courts, controlling effect, 731.

construction of Safety Appliance Act, federal decisions controlling, 1267.

contributory negligence as matter of law, choosing dangerous way to uncouple cars, safe method available, Safety Appliance Act, 1409.

damages recoverable under Employers' Liability Act, federal decisions controlling, 1073.

employees engaged in interstate commerce under Employers' Liability Act, application of decisions construing Safety Appliance Act, 800.

iron worker carrying material to repair bridge, 815, 818.

Hours of Service Act, limitation, tower men and switch tenders, 1462.

negligence, determination according to decisions of Federal Courts, Employers' Liability Act, 928.

final decision of Supreme court, 933.

**Congress,**

automatic couplers, object of Congress in requiring, 1340.

causes of enactment of original Safety Appliance Act, 1253.

Commerce Clause of Federal Constitution, Ch. I, 3-34.

compensation, Adamson Eight-Hour Wage Law, validity, 1509.

contributory negligence, modification by Employers' Liability Act, purpose of Congress, 1034.

Employers' Liability Act, effect upon state laws, exclusiveness of Federal Act, 721.

Employers' Liability Act of 1908, validity, 694.

employees of interstate carriers, federal and state control, hours of service, 1432.

Hours of Service Act, purpose of Congress in enactment, 1442.  
validity, 1437.

interstate commerce,

authority of Congress, scope of power, 3, 147.

"regulation" of interstate and foreign commerce, definition and explanation of power, 14.

regulations of Congress, common law of state courts superseded, 58.

intrastate subject matters, valid regulations, 54.

state laws on same subject superseded, 55.

**Congress—Continued.**

interstate commerce—continued.

subject matter covered, difficulty of defining, 57.

validity, necessity of connection with interstate commerce, 50.

state and national governments, respective powers over common carriers, Ch. II, 35-107.

general principles governing control, 37, 41.

state control, extent of power over intrastate commerce, similarity to power of Congress, 68.

invalidity of federal laws and regulations encroaching upon state's power, 48.

Interstate Commerce Act, original form, history, purpose, scope and validity, Ch. IV, 137-157.

intoxicating liquors, regulation of shipment by states, federal statutory exceptions establishing power, 32.

master and servant, power of Congress to regulate, scope, nature and extent of power, 689.

purpose of Congress in enacting Safety Appliance Act, 1265.

war, carriers, federal and state control during war, Ch. III, 108-133.

**Conspiracy,**

Bill of Lading Act, leading provisions, 618.

**Constitutional law,**

Adamson Eight-Hour Wage Law, validity, 1509.

assumption of risk, abolition or modification by state constitutions, effect, Employers' Liability Act, 984.

Bill of Lading Act, constitutionality of statute, 610.

Carmack Amendment, validity, 531.

cars, intrastate cars, validity of amendment including, Safety Appliance Act, 1273.

Commerce Clause of Federal Constitution, Ch. I, 3-34.

contracts, prohibition of Employers' Liability Act, statutory provision, validity, 1132.

drawbars, height, delegation of authority as to height, validity, Safety Appliance Act, 1280.

due process, track connections for interchange of traffic, power of state to compel making and maintenance, 90.

Employers' Liability Act of 1906, invalidity, 691.

Employers' Liability Act of 1908, validity, 694.

Hours of Service Act, validity, 1437.

statute not void for uncertainty, 1439.

incriminating testimony, testimony before Interstate Commerce Commission, invalid statute remedied by Compulsory Testimony Act, 162.

jury, state laws permitting verdict by less than twelve, validity in actions under Employers' Liability Act, 1236.

Safety Appliance Act, validity, 1264.

**Constitutional law—Continued.**

trial by jury, damages for violation of Interstate Commerce Act, findings of fact by Commission required, validity, 517.

**Continuance,**

hearing before Commerce Commission, 679.

rules of Interstate Commerce Commission, 1579.

**Contracts,**

compelling production of, Interstate Commerce Commission, 679.

discrimination, contract with discriminatory provisions, invalidity, 316.

enforcement, damages for violation of Interstate Commerce Act, authority of Commission, extension only to violations of act, 490. filing with Commerce Commission, public records as prima facie evidence, 680.

text of Interstate Commerce Act, 1520.

**limitation of carrier's liability,**

contract against negligence, invalidity, stipulation filed with Commission, 578.

contract with initial carrier, connecting carrier benefited, 607.

loss by fire not due to negligence, 576.

notice of claims, regulation by statute, Cummins Amendment, 563.

money only may be received for transportation by carriers; Interstate Commerce Act, 479.

prohibition of Employers' Liability Act, Ch. XXXII, 1131-1136.

application to existing and future contracts, 1133.

limitation of statute to employees of carrier, 1134.

releases and settlements, effect, release not a contract within statute, 1135.

statutory provisions, 1131.

validity, 1132.

railroad, definition, Hours of Service Act, 1444.

rates, publication and filing, changes prohibited, oral contracts, contravening schedules unlawful, 455.

private duties of carriers, 482.

relief fund, acceptance of benefits by employee, actions against joint tort-feasors not barred, Employers' Liability Act, 1134.

Safety Appliance Act not to be evaded by contract, 1323.

duties not assignable, 1325.

**Corporations,**

books and records of interstate carriers under jurisdiction of Interstate Commerce Commission, Hepburn Act, 185.

carriers, subjection to Interstate Commerce Act, 260.

complaints to Commerce Commission, who may make, 664.

foreign corporations, employees engaged in interstate commerce under Employers' Liability Act, 891.

subjection to Interstate Commerce Act, 260.

Interstate Commerce Commission, nature, 628.

**Corporations—Continued.**

- officers of railroad companies,
  - authority, order of director general of railroads, 1697.
  - limit, order of director general of railroads, 1687.
- regulation, state and national control over interstate carriers, general principles determining, 44.
- public interest, state control over intrastate commerce, 71.
- taxes, imports from foreign states, immunity from state legislation, 20.

**Correspondence schools,**

- interstate commerce, transportation from one state to another as essential element, 10.

**Costs,**

- actions by poor persons, permitting, Employers' Liability Act, 1248.

**Cotton,**

- discrimination, grant of wharfage privilege denied to other shippers, Interstate Commerce Act, 351.
- interstate transportation, temporary stopping or interruption of shipments, interstate character not changed, 276.
- transit privileges, control of Interstate Commerce Commission, 285.
- rates for transportation, increase, order of director general of railroads, 1738.

**Courtesy,**

- employees of railroads, duty to be courteous, order of director general of railroads, 1777.

**Courts,**

- see INTERSTATE COMMERCE COMMISSION.

- damages for violation of Interstate Commerce Act, jurisdiction of courts and commission, Ch. XIV, 484, 527.

- jurisdiction of state courts not wholly superseded, 501.

- orders of Commission awarding damages, enforcement in state and federal courts, 522.

- state courts, actions for damages under section eight of Interstate Commerce Act, not prosecuted in state courts, 498.

- Employers' Liability Act, jurisdiction of state and federal courts, Ch. XXXIV, 1145-1169.

- negligence, determination according to decisions of Federal Courts, 928.

- final decision of Supreme court, 933.

- procedure, state laws, controlling effect, 733.

- jurisdiction, see JURISDICTION.

- loss and damage to interstate shipments, initial carrier's liability, Carmack Amendment, enforcement by state courts, 548.

- rates, publication and filing, courts bound by published rates until set aside by Interstate Commerce Commission, 462.

**Courts—Continued.**

Safety Appliance Act, actions for personal injuries, enforcement in state courts, 1416.

**Criminal law,**

see PENALTIES.

construction of Safety Appliance Act, rules as to criminal statutes not applicable, 1266.

penalties, recovery not criminal action, Safety Appliance Act, 1425.  
"preponderance of evidence," definition, actions for penalties under Safety Appliance Act, 1427.

state laws, punishment of crime against two sovereignties, rule not applicable, Safety Appliance Act, 1279.

war, federal control of carriers during war with Germany, penalty for violation of federal statute, 132.

obstruction of movement of interstate commerce as crime, 197.

**Cullom Committee,**

Interstate Commerce Act, preliminary steps toward enactment, Cullom Committee, 149.

report, recommendation of bill, 150.

**Cummins Act,**

Carmack Amendment, modification, First and Second Cummins Amendments, Ch. XVI, 555-570.

liability of carriers, basis, nature and extent, Ch. XVII, 571-608.  
text, 555.

**Customs and usages,**

appliances, carrier's duty to exercise ordinary care, custom of other railroads not conclusive as to care exercised, Employers' Liability Act, 927.

construction of Safety Appliance Act, custom of railroad, effect in construing, 1267.

**Customs duties,**

discrimination, collection of private charges, assistance by carrier, refusal of service to other shippers, Interstate Commerce Act, 368.

**D.****Damages,**

appeal, penalty added to judgment on affirmance, action under Employers' Liability Act, 1247.

apportionment, action under Employers' Liability Act, difference from Georgia statute, 1038.

verdict, apportionment to each beneficiary, 1129.

carrier's liability for damage, see CARRIERS.

claims for reparation, basis on findings of Commerce Commission, 674.

rules, 1578.

**Damages—Continued.**

- comparative negligence, different theories, adoption of theory by Employers' Liability Act, 1033.
- gross negligence of plaintiff and slight negligence of defendant, recovery under Employers' Liability Act, 1039.
- complaints to Commerce Commission. absence of direct damage not ground for dismissal, 666.
- essentials when reparation is sought, 672.
- death, see DEATH BY WRONGFUL ACT.
- excessive damages,
  - Employers' Liability Act, writ of error, excessive verdict not reviewable, 1166.
- exemplary damages, Employers' Liability Act, exemplary damages not awarded, 1093.
- fraudulent claims against carriers penalized, amendment to Interstate Commerce Act, 189.
- investigations, publication of reports not to be used in damage suits, Accident Reports Act, 1505.
- loss and damage to interstate shipments, liability, Carmack amendment, Ch. XV, 528-554.
- mental anguish, regulations of Congress, interstate commerce, common law of state courts superseded, 60.
- pain and suffering, recovery under Employers' Liability Act,
  - award where death is not instantaneous, 1066.
  - compensation for loss, future earnings not recoverable, 1069.
  - federal question, binding effect of ruling of state courts, 1162.
  - limitation to pain suffered before death, 1068.
  - negligence, necessity of negligence to warrant recovery, 1072.
  - no recovery prior to 1910 Amendment, 1070.
  - no recovery where death is instantaneous, 1071.
- payment of claims, order of director general of railroads, 1779-1781.
- proximate cause, defective equipment must be proximate cause, action for damages, Safety Appliance Act, 1326.
- rates,
  - publication and filing, collection of scheduled rates, counterclaim , for damages to goods prohibited, 475.
  - damages for collection of rate in excess of scheduled rate by shipper, 479.
  - damages for failure to post rates not recoverable, 475, 478.
  - penalty for making erroneous quotation of rate, damage to shippers, 473.
- reduction of damages, Employers' Liability Act,
  - contributory negligence, 1028, 1041.
  - damages not reduced, 1048.
  - defense, recovery not barred, 1029.
  - evidence admissible under general denial, 1051.
  - instructions, duty of court to instruct, 1043.
  - errors, 1045.

**Damages—Continued.**

- reduction of damages, Employers' Liability Act—continued.
  - language of statute not erroneous, 1045.
  - manner of instructing, 1044.
  - negligence of employe must be proximate cause of injury, 1039.
  - pleading, necessity, determination by state law, 1050.
  - purpose of Congress, 1034.
- remedies, discrimination and undue preferences, common law rules, 304.
- reports of accidents, damage suits, reports not to be used, Boiler Inspection Act, 1498.
- violation of Interstate Commerce Act,
  - actions for overcharges exceeding scheduled rates, prosecution in courts without determination of commission, 494.
  - assignment of claims for damages, 526.
  - attorney's fees, services before Commission, allowance not permitted, 526.
  - authority of courts and Commission, 485; see Ch. XIV, 484-527.
  - authority to award damages conferred on Commission, 487.
  - extension only to violations of act, 490.
- discrimination,
  - award by Commission, 488.
  - evidence of injury, measure of damages, 320.
  - necessity of order of Commission to recover damages in courts, 500.
- excessive rates, courts without primary jurisdiction to award damages, 492.
- findings of fact by Commission required, award of damages against carriers, 516.
- validity of statute, 517.
- inadequate service or facilities, award by Commission, 513.
- jurisdiction of state courts not wholly superseded, 501.
- limitations, complaints, filing with Commission within two years, 523.
- maximum rate need not be prescribed by Commission, 519.
- measure of damages, unreasonable rates and unlawful discrimination, 503.
- misrouting shipments, award by Commission, 513.
- orders of Commission awarding damages, enforcement in state and federal courts, 522.
- parties entitled to damages, excessive freight charges, consignors and consignees, 506.
- pecuniary loss must be shown, 502.
- rates, arbitrary sum added to sale price to cover excessive charges, right of shipper to reparation, 507, 508.
  - award by Commission as bar to action for additional damages, overcharges, 513.

**Damages—Continued.**

violation of Interstate Commerce Act—continued.

findings of Commission as to reasonableness of rates, all persons benefited, 515.

past shipments with excess rates, damages not automatically awarded, 509.

remedy before Commission, establishment, conflicting provisions of statute harmonized, 491.

state courts, actions for damages under section eight of Interstate Commerce Act not prosecuted in state courts, 498.

statutory provision creating liability, 485.

war, federal control during war with Germany, right to sue carriers under federal control, 129.

**Death by wrongful act,**

actions under Employers' Liability Act,

abandonment of wife and child, effect as to recovery, 1087.

alien dependents, recovery by, 1055.

appeal, federal question, binding effect of ruling of state courts, 1162.

right to writ of error not always raised by pleadings, 1163.

appliances, ordinary care, custom of other railroads not conclusive as to care exercised, 927.

assumption of risk, 978.

risks assumed, violation of state statutes not included, 1011.

beneficiaries, 1053.

dependency of next of kin not created by gifts, 1110.

estate of decedent not entitled to damages, 1091.

existence as jurisdictional, 1056.

necessity of showing dependency of next of kin, 1104.

"next of kin," determination by state law, 1058.

illegitimate children, 1059.

settlement with one beneficiary, action by personal representative not defeated, 1128.

statutory action not for equal benefit of surviving beneficiaries, 1081.

cars, use in interstate traffic, materiality, 1288.

damages, Ch. XXXI, 1061-1130.

apportionment, excessive apportionment to one beneficiary, effect, 1126.

apportionment to each beneficiary in verdict, 1129.

compensatory damages, measure, 1073.

contributions by deceased, necessity of showing, 1093, 1100.

contributory negligence, apportionment of damages, manner, 1041.

recovery not barred, 1029.

dependency of next of kin, necessity of showing, 1104.

not created by gifts, 1110.

what constitutes, 1106.



**Death by wrongful act—Continued.**

actions under Employers' Liability Act—continued.

- distribution controlled by Federal statute, 1082.
- distribution, settlement by payment of lump sum, 1083.
- earning capacity, necessity of evidence of deprivation, 1092.
- elements, loss of care, training of minors, 1089.
- loss of society and wounded affections not elements, 1088.
- exemplary damages not awarded, 1093.
- funeral expenses not recoverable, 1093.
- instructions, reference to sum sued for not error, 1124.
- loss of future benefits limited to present cash value, 1075, 1079.
- measure of damages, federal decisions controlling, 1073.
  - instructions approved, 1120.
  - instructions held erroneous, 1116.
  - various beneficiaries, 1111.
- necessity of pecuniary loss, 1063.
- negligence, necessity of negligence to warrant recovery, 1072.
- pain and suffering, award where death is not instantaneous, 1066.
  - compensation for loss, future earnings not recoverable, 1069.
  - limitation to pain suffered before death, 1068.
  - no recovery prior to 1910 Amendment, 1070.
  - no recovery where death is instantaneous, 1071.
- pecuniary loss, applicability of state statute entitling father to earnings of children, 1126.
  - not dependent on legal liability of employe to beneficiaries, 1082.
- presumption of damages to widow and child, non-existence, 1086.
- reduction, because of contributory negligence, cure of error by remittitur, 1127.
  - propriety of special verdicts, 1128.
- state statutes limiting amount recoverable not applicable, 1124.
- statutory provision, 1062.
- election, cause of action under state law and Federal Act, motion to elect before trial, sustaining, 1231.
- evidence, admissibility, testimony of widow or other beneficiaries, determination by law of forum, 1219.
- former adjudication, action under state law as bar to action under Federal Act, 1241.
- instructions, harmless errors, actions under Federal Act, 1243.
- limitation, accrual of cause of action, 1142.
- negligence, evidence held not to show actionable, 969.
  - injury caused by servant acting within scope of employment, necessity, 936.
- presumption of negligence created by state statute, applicability of Mississippi statute, 948.

**Death by wrongful act—Continued.**

actions under Employers' Liability Act—continued.

presumption of negligence created by state statute not applicable, 946.

provision imposing liability for negligence, 912.

proximate cause, death due "in whole or in part" to negligence, 955.

meaning of phrase, 945.

willful wrongs not within act, 976.

parents not entitled to damages when there is widow or children, 1054.

parties, ancillary administrator may sue, 1175.

revival of suit by personal representative only, 1176.

suit only by personal representative, 1170.

want of legal capacity to sue in widow cannot be waived, 1173.

widow cannot sue although sole beneficiary, 1172.

parties defendant, agents and servants causing injury, non-liability, 1177.

personal representative, action in state other than where appointed, necessity of consent, 1178.

existence of other property not necessary for appointment, 1176.

petition, allegation as to engagement in interstate commerce held sufficient, 1197.

cause of action under state law, recovery where evidence shows case under Federal Act, harmless error, 1189.

necessity of showing injury or death under conditions described in statute, 1179.

pecuniary loss to beneficiaries must be alleged, 1201.

survival of beneficiaries, necessity of alleging, 1200.

removal of causes, petition not stating cause of action under Federal Act although so intended, 1152.

petition stating cause of action under state and Federal Act, 1149, 1150.

settlement, power of administrator to settle without court's consent, 1247.

text of Federal statute as amended, 1590-1592.

**Safety Appliance Act,**

automatic couplers, injury to employees on duty, violation of statute not actionable, 1347.

object of Congress in requiring, 1340.

trainmen on top of cars protected, 1346.

violation of act, illustrations, 1341.

cause of enactment of original act, 1253, 1265.

duties imposed by statute in one relation not actionable in another, 1318.

exception from requirements of act, statutory provision, 1385.

**Death by wrongful act—Continued.****Safety Appliance Act—continued.**

limitation of actions, provision of Employers' Liability Act, controlling effect, 1422.

state statute, effect in absence of interstate employment, 1423.

negligence, violation of act as negligence per se, 1306.

evidence of negligence not required, 1320.

repairs, relief from penalty, liability for personal injuries not affected, 1396.

similarity to actions for penalties, 1313.

**Debt, action of,**

penalties, remedy for recovery, Safety Appliance Act, 1425.

**Definitions,**

"accident," exception to Hours of Service Act, 1473.

"act of God," exception to Hours of Service Act, 1473.

"among," construction of commerce clause, 6.

"among the several states," applicability of Employers' Liability Act, 717.

assumption of risk,

confusing with contributory negligence, 1012.

distinction from contributory negligence, 1006, 1403.

ordinary, known or obvious risks assumed by employees, Employers' Liability Act, 987.

"casualty," exception to Hours of Service Act, 1473, 1478.

"commerce," applicability of Employers' Liability Act, statutory rules, 717.

common carriers,

air brakes, necessity, Safety Appliance Act, 1332.

application of Safety Appliance Act to railroads which are common carriers, 1285.

Ash Pan Act, 1671.

receivers as "common carriers," 1503.

common law definition, 202.

distinguished from industrial railways, plant facilities, 203.

express companies, Interstate Commerce Act, 255.

sleeping car companies, Interstate Commerce Act, 258.

stock yards company, Interstate Commerce Act, 236.

text of Employers' Liability Act, 1591.

text of Interstate Commerce Act, 1513.

"common control, management or arrangement for a continuous carriage or shipment," Interstate Commerce Act, 216.

comparative negligence, Employers' Liability Act, 1033.

contributory negligence,

distinction from assumption of risk, 1006, 1403.

Employers' Liability Act, 1029.

instruction; errors, 1045.

Safety Appliance Act, 1403.

## Definitions—Continued.

- "dependency," damages recoverable by next of kin, Employers' Liability Act, 1106.
- dependency of next of kin not created by gifts, 1110.
- discrimination, relation of discrimination clause of Interstate Commerce Act to Elkins Act of 1903, 314.
- prejudice to one party and advantage to others necessary under Interstate Commerce Act, 314.
- unjust discrimination and undue preferences, common law rules, 304.
- definition by Interstate Commerce Act, 303.
- applicability to subsequent amendments, 312.
- difference in charges, dissimilarity of services, 312.
- distinction between section two and clause in section one as to unreasonable charges, 310.
- origin and history of definition, 306.
- purpose of definition, 307.
- relation and distinction between section two and three, 209.
- "emergency," Hours of Service Act, 1482.
- insubordination of employe as emergency, 1484.
- "employe," Boiler Inspection Act, 1498.
- text of Boiler Inspection Act, 1635.
- text of Hours of Service Act, 1633.
- text of Interstate Commerce Act, 1515.
- "families," text of Interstate Commerce Act, 1515.
- "ferry," Interstate Commerce Act, 214.
- "foreign commerce," Accident Reports Act, 1504, 1673.
- "in whole or in part," Employers' Liability Act, 946.
- "interstate commerce,"
  - Accident Reports Act, 1504.
  - text, 1673.
- elements,
  - change of destination in transit, 270.
  - loading, dunnage, and special preparation of freight cars for shipment, 287.
  - origin and destination of shipments, continuous carriage, 263, 265.
  - temporary stopping or interruption of shipments, change into intrastate commerce, 273.
  - interstate character not changed, 276.
  - transit privileges, control of Interstate Commerce Commission, 285.
  - transportation from one state to another as essential element, 10.
- Employers' Liability Act, 738.
- railroad wholly within single state, 742.
- Federal Constitution, 8.
- Safety Appliance Act, 1284.
- subject matter covered, difficulty of defining, 57.
- telegraph messages as interstate commerce, 104, 245.

## Definitions—Continued.

- "lawful holder," loss and damage, initial carrier's liability, action by "lawful holder," of bill of lading, 584.
- "like," discrimination, conditions warranting different charges, Interstate Commerce Act, 311.
- "like traffic," rates, wheat and coarse grain, different rates, 412.
- "may compete for traffic," prohibition of ownership of competing water lines of carrier by rail, 225.
- "movement," watching locomotive as being "on duty," fireman engaged in movement of trains, Hours of Service Act, 1458.
- "necessary movements," for repairs, exception from Safety Appliance Act, 1386.
- "negligence," definition by United States Supreme court, Employers' Liability Act, 926.
- "on duty," Hours of Service Act, 1448.
  - watching locomotive as being "on duty," 1458.
- "or elsewhere," Panama Canal Act, prohibition of ownership of competing water lines of carrier by rail, 225.
- "or otherwise," Panama Canal Act, extension of federal jurisdiction over water carriers, 220.
- "ordinary live stock," Interstate Commerce Act, 1543.
- "original package," protection of Interstate Commerce Clause, 24.
- "party rate tickets," discrimination, 422.
- "peddling service," Interstate Commerce Act, 299.
- "preponderance of evidence," actions for penalties under Safety Appliance Act, 1427.
- "railroad,"
  - Boiler Inspection Act, 1498.
  - text, 1635.
  - bridges as railroads, Interstate Commerce Act, 226.
  - discrimination, Interstate Commerce Act, 312, 334.
  - Employers' Liability Act, bridges, ferries and tracks included, 739.
  - ferry, Interstate Commerce Act, 214.
  - Hours of Service Act, 1444.
  - text, 1633.
  - Interstate Commerce Act, 167, 300.
  - text, 1513.
  - street railroads as being subject to Interstate Commerce Act, 230.
  - street railroads not subject to Employers' Liability Act, 755.
- "rates," discrimination, 370.
- "rebate" distinction between ordinary and statutory definition, Interstate Commerce Act, 313.
- "regulation," applicability of Employers' Liability Act, statutory rules, 717.
- "regulation" of interstate and foreign commerce, 14.
- "res ipsa loquitur," actions under Employers' Liability Act, 951.
- "spotting," discrimination, "spotting" cars for certain shippers, refusal of service to others, Interstate Commerce Act, 371.

**Definitions—Continued.**

"trains," Safety Appliance Act, 1330.

"transit privileges," unlawful discrimination by carriers, 353.

"transportation," 312, 334, 635.

Interstate Commerce Act, 167, 300.

text, 1514.

loss and damage by initial carrier, 592.

private car lines as being subject to Interstate Commerce Act, 240.

Safety Appliance Act, 1284.

"trap car service," practice not unlawful if no preference, Interstate Commerce Act, 372.

"unavoidable accident," exception to Hours of Service Act, 1473.

"undue," discrimination, statutory definition, 316.

"unreasonable," discrimination, statutory definition, 316.

"use" of cars and "haul," distinction eliminated by 1903 Amendment, Safety Appliance Act, 1304.

"used," extension of Safety Appliance Act to cars, etc., "used" on interstate highways, 1276.

**Delay,**

Hours of Service Act,

continuity, breaking of, brief periods off duty, 1450.

ordinary delay incident to train operation, no excuse for violation of statute, 1481.

watching locomotive as being "on duty," firemen engaged in movement of trains, Hours of Service Act, 1458.

when statute is not applicable, 1471.

**Demurrage,**

discrimination, track storage and demurrage charges, Interstate Commerce Act, 345.

control of Commerce Commission, 294.

general orders of director general of railroads, federal control, 1679.

loading and unloading cars, order of director general of railroads, 1684.

rates, publication and filing, changes prohibited, 449.

demurrage charges to be filed with Interstate Commerce Commission, 448.

**Depositions,**

Interstate Commerce Commission, power to take depositions, 162, 677, 679.

rules of Interstate Commerce Commission, 1579.

text of Interstate Commerce Act, 1527.

**Depots,**

rates, publication and filing, damages for failure to post rates not recoverable, 475, 478.

posting not essential, 439.

**Derailments,**

duties of carriers under Accident Reports Act, 1506.

investigation by Interstate Commerce Commission, 1505.

**Derailments—Continued.**

Hours of Service Act, exceptions, derailments and collisions as "casualties," 1478.

**Descent and distribution,**

death, damages recoverable under Employers' Liability Act, distribution controlled by Federal statute, 1082.

settlement by payment of lump sum, 1083.

**Detectives,**

employees engaged in interstate commerce, police duties, watchmen and detectives, Employers' Liability Act, 901.

**Dining cars,**

see CARS.

**Directing verdict,**

appeal, refusal not reviewable unless clearly erroneous, Employers' Liability Act, 1169.

demurrer to evidence, state law not controlling, Employers' Liability Act, 1220.

judgment notwithstanding verdict, power of state courts to direct, action under Employers' Liability Act, 1246.

penalties, recovery not criminal action, Safety Appliance Act, 1425.

**Director general,**

general orders of director general of railroads, federal control, 1678-1783.

**Discrimination,**

action for unlawful discrimination, evidence of injury, measure of damages, 320.

excessive rates, courts without primary jurisdiction to award damages, 492.

findings of fact by Commission required, award of damages against carriers, 516.

jurisdiction of state courts not wholly superseded, 501.

measure of damages, unreasonable rates and unlawful discrimination, 503.

necessity of order of Commission to recover damages in courts, 500.

pecuniary loss must be shown, 502.

actions for overcharges exceeding scheduled rates, prosecution in courts without determination of Commission, 494.

advantage to particular kinds of traffic, Ch. XI, 399-417.

award of damages by Interstate Commerce Commission, 488.

inadequate service or facilities, 513.

**cars,**

placing or "spotting" cars for certain shippers, refusal of service to others, 371.

prepared for shipment, refusal of service to other shippers, 362.

cash payment demanded of some shippers, credit extended to others, Interstate Commerce Act, 369.

**Discrimination—Continued.**

- collection of private charges, assistance by carrier, refusal of service to other shippers, 368.
- complaints, filing before Commerce Commission, rules governing, 671.
- contract with discriminatory provisions, invalidity, 316.
- definition by Interstate Commerce Act, origin and history of definition, 306.
  - purpose of definition, 307.
  - relation and distinction between section two and three, 309.
  - subsequent amendments, applicability of definition, 312.
- difference in charges, conditions warranting different charges, 311.
  - dissimilarity of services, 312, 326.
- difference in rates for wholesalers and retailers prohibited, Interstate Commerce Act, 328.
- Elkins Act, text, 1553.
- equality required of carriers in dealing with shippers, equal facilities to be afforded, 324.
- exclusive privileges, auxiliary facilities at stations and terminal grounds, legality, 339.
- existence of unjust discrimination or undue preference as question of fact, 317.
- general principles, Ch. VIII, 302-322.
- grain elevator service, allowance to shipper owning elevator, 364.
  - preferences prohibited, 363.
- grant of wharfage privilege denied to other shippers, 351.
- hauling by vehicle from destination point, reduced rates not permitted, 362.
- hearing before Commission, briefs, rules governing filing, 681.
- Hours of Service Act, validity, classification of operators, statute not invalid, 1439.
- increased rates on domestic traffic, export traffic between ports of entry and inland points, 331, 332.
- interchange of traffic, use of terminal facilities, denial of use to certain carriers, 334.
- Interstate Commerce Act, Amendment of 1889, mandamus rendered available to shippers, 159.
  - causes for enactment, inadequacy of common law remedies, 141.
  - causes leading to enactment of original act, 139.
  - construction and interpretation, 155.
  - penalties for violation of act, Amendment of 1889, 160.
  - purpose of original enactment, prevention of discrimination, 154.
- joint rates, abnormal division to carriers, 349.
- joint through rates, divisions to tap lines or logging roads, 349.
- lighterage services, free delivery zone, shippers outside zone not discriminated against, 365.
- long existence of undue discrimination not justification for continuance, 319.
- methods and means rendered unlawful, 315.



**Discrimination—Continued.**

passenger service, Ch. XII, 418-429.

sale of number of tickets at less rate than for single passenger, distinction between wholesale rates in passenger and freight traffic, 425.

prejudice to one party and advantage to others, necessary under Interstate Commerce Act, 314.

prohibition from owning or having interest in freight transported, amendment to Interstate Commerce Act, Commodity Clause, 175.

prohibition of Interstate Commerce Act, judgments by assent and waiver of defenses prohibited, 319.  
text, 1516.

prohibition of rebates and discrimination, amendment to Interstate Commerce Act, Elkins Act of 1903, 164.

railroad discriminating against steamship lines, power of Interstate Commerce Commission, 657.

rates,

allowances to shippers for services rendered in connection with transportation, authority of Interstate Commerce Commission, Hepburn Act, 180.

carriers as shippers, preferences prohibited, 358, 359.

common law, publicity and permanency of rates at common law, 431.

deduction to pay shippers for building tie hoists, 370.

different conditions affecting transportation of similar commodities, lumber and logs, no discrimination, 415.

different methods of loading not justification for different rates, 371.

different uses of commodities, different rates not justified, 413.

filing and publication of interstate rates, effect, Ch. XIII, 430-483  
changes prohibited, 449.

collection of scheduled rates mandatory, 466, 469.

courts bound by published rates until set aside by interstate Commerce Commission, 462.

necessity to prevent discrimination, 431.

privileges furnished shippers and not specified in schedule unlawful, 444.

"like traffic," wheat and coarse grain, different rates, 412.

lumber and lumber products, discrimination prohibited, 414.

oil shipped in barrels and in tank cars, justifiable discrimination, 414.

publicity, purpose of Congress in enactment of Interstate Commerce Act, 435.

rates to other carriers as shippers, preferences prohibited, 358.  
359.

rebates to pay for land for right of way, 368.

reduced rates for shipments by train loads, small shippers subjected to undue disadvantage, 330.

reduced rates on return shipments, illegality, refusal of shipment by consignee, 416.

**Discrimination—Continued.**

## rates—continued.

- services, facilities and allowances, discrimination between shippers, Ch. IX, 323-372.
- suspension of proposed changes, power of Interstate Commerce Commission, amendment to act, 190.
- text of Interstate Commerce Act, 1517.
- unlawful preferences between cities and localities, Ch. X, 373-398.
- "rebate," distinction between ordinary and statutory definition, 313.
- text of Interstate Commerce Act, 1516.
- relation of discrimination clause of Interstate Commerce Act to Elkins Act of 1903, 314.
- route of through shipments, right to route beyond carrier's terminal, 337.
- services of shippers, allowance of compensation, denial to other shippers not illegal, 357.
- contracts requiring expedited services not open to all shippers, 357.
- unreasonable compensation to shippers, 348.
- shortage of cars, equal distribution among shippers necessary, 342.
- statutory definition, comparison of all facts and circumstances required, 316.
- storage regulations, preferences prohibited, 361.
- strict uniformity not always required, 318.
- switch connection with private side tracks and lateral branch lines, power of Interstate Commerce Commission to order, Hepburn Act, 171.
- switch connections, text of Interstate Commerce Act, 1516.
- telegraph companies, state laws superseded by federal control under Interstate Commerce Act, 248.
- through routes and joint rates with water lines, refusal of railroad to establish, 338.
- track storage and demurrage charges, 345.
- transit privileges, compensation not limited to actual cost, 356.
- extension over twelve months unreasonable, exceptions, 357.
- Interstate Commerce Act violated, 353.
- trap car service, practice not unlawful if no preference, 372.

**Disease,**

see HEALTH.

**Dismissal,**

- complaints to Commerce Commission, absence of direct damage not ground for dismissal, 666.
- gross negligence of plaintiff and slight negligence of defendant, recovery not prevented, Employers' Liability Act, 1039.

**District Attorney,**

Hours of Service Act, violation of statute, duty, 1444.

**District Attorney—Continued.**

Interstate Commerce Act, enforcement, Amendment of 1889, 161.

**District of Columbia,**

Accident Reports Act, applicability, 1504.

Adamson Law, eight hours as basis of day's work, applicability, 1507.

ash pans, federal statute requiring equipment, 1502.

Boiler Inspection Act, applicability, 1491.

Employers' Liability Act, applicability, 758.

Employers' Liability Act of 1906, invalidity, 691.

Hours of Service Act, applicability, 1434.

Interstate Commerce Act, applicability, 205.

Safety Appliance Act, applicability, 1269.

**Drains,**

employees engaged in interstate commerce, drainage, excavating ditches, Employers' Liability Act, 834.

**Drawbars,**

agitation for safety appliances on all cars, 1260.

defective cars containing live stock or perishable freight, moving with chains, 1397.

height, delegation of authority as to height, validity, 1280.

duty not to be delegated or evaded, 1382.

instructions erroneous under old and new orders of Interstate Commerce Commission, 1379.

instructions erroneous under old order of Interstate Commerce Commission, correctness under new order, 1379.

order of Interstate Commerce Commission, amendment to Safety Appliance Act, 1376.

new and old orders, 1261, 1377.

original order, 1257.

necessity, application of Safety Appliance Act to locomotives, 1380.

negligence, violation of Safety Appliance Act, evidence of negligence not required, 1320.

repair of cars, right to move in revenue trains or with other cars, 1391.

Safety Appliance Act as amended, text, 1593.

statutory requirements, Safety Appliance Act, Ch. XLVI, 1376-1384.

**Dynamite,**

see EXPLOSIVES.

**E.****Earning capacity,**

death, damages recoverable under Employers' Liability Act, compensatory damages, measure, 1073.

contributions by deceased, necessity of showing, 1093, 1100.

dependency of next of kin, necessity of showing, 1104.

**Earning Capacity—Continued.**

death, damages, etc.—continued.

estate of decedent not entitled to damages, 1091.

measure of damages, various beneficiaries, 1111.

**Election,**

cause of action under state law and Employers' Liability Act, motion to elect before trial, sustaining, 1231.

former adjudication, commencement of action under state law not bar to suit under Federal Act, 1240.

motions to elect under Iowa statute, 1229.

no election by widow suing as individual and as administratrix, 1233.

time of sustaining motion to elect, 1227.

**Elections,**

employes of railroads, prohibition from participation in, order of director general of railroads, 1782.

**Electricity,**

air brakes, necessity, interurban electric trains, Safety Appliance Act, 1332.

Ash Pan Act, statute not applicable to electric locomotives, 1503.

**Elevators,**

discrimination, grain elevator service, allowance to shipper owning elevator, 364.

definition by Interstate Commerce Act, applicability to subsequent amendments, 312.

preferences prohibited, 363.

interstate commerce, grain elevation service, regulation under federal control, 286.

rates, publication and filing, privileges furnished shippers and not specified in schedule unlawful, 444.

"transportation," term as used in Interstate Commerce Act, 300.

**Elkins Act,**

amendments to Interstate Commerce Act, Elkins Act of 1903, prohibition of rebates and discrimination, 164.

common carriers, subjection to Interstate Commerce Act, Hepburn Amendment, 257.

discrimination, cash payment demanded of some shippers, credit extended to others, 369.

relation of discrimination clause of Interstate Commerce Act to Elkins Act of 1903, 314.

text, 1553-1556.

**Eminent domain,**

valuation of property of interstate carriers, duty of Interstate Commerce Commission under Act of 1913, 195.

**Employers' Liability Act,**

- Act of 1906, invalidity, 691.
- Act of 1908, validity, 694.
- actions by poor persons, permitting, 1248.
- actions for personal injuries, enforcement in state courts, Safety Appliance Act, 1416.
- similarity to actions for penalties, 1313.
- alien dependents, recovery under statute, 1055.
- Amendments of 1910, purpose of enactment, 715.
- appeal, directing verdict, refusal not reviewable unless clearly erroneous, 1169.
- federal question, binding effect of ruling of state courts, 1162.
- manner of asserting, 1164.
- petition not stating good cause of action under Federal Act, 1166.
- pleading and practice in state courts not federal questions, 1167.
- pleading Federal Act and submitting case under state law, federal right not denied, 1165.
- right to writ of error not always raised by pleadings, 1163.
- harmless errors, 1243.
- penalty added to judgment on affirmance, 1247.
- pleading of Federal Act, statute requiring, no denial of federal right, 1167.
- review, extent of power, incidental and non-federal questions not reviewable, 1161.
- review of judgment of state courts by United States Supreme court, 1153.
- writ of error, essentials of record, denial of right under federal laws, 1159.
- evidence insufficient to show liability, 1160.
- excessive verdict not reviewable, 1166.
- exclusion of remedy in certain cases, 1156.
- appliances, carrier's duty to exercise ordinary care, 927.
- custom of other railroads not conclusive as to care exercised, 927.
- assumption of risk, Ch. XXVIII, 978-1027.
- application of doctrine, analysis of federal decisions, 996.
- burden of proof on defendant, 1017.
- confusing with contributory negligence, instructions, 1012.
- defense, effect of state constitution and statutes abolishing or modifying doctrine, 984.
- defense not available, number of causes of injury, 1014.
- violation of Hours of Service Act, 1012.
- violation of rules, 1015.
- violation of Safety Appliance Act, 1008.
- defense to negligence of fellow-servants, 993.
- defense under statute, conflict of decision, 979, 982.

**Employers' Liability Act—Continued.**

assumption of risk—continued.

determination, controlling effect of federal decisions, 986.

distinction from contributory negligence, 1006.

Safety Appliance Act, 1403.

employees held not to have assumed risk, 1023.

employees held to have assumed risk, 1018.

instruction applicable to evidence, necessity of giving, 1015.

instruction, omission of instruction as harmless error, 1016.

ordinary, known or obvious risks assumed by employees, 987.

exceptions, promise to repair, 992.

pleading of defense, necessity, 1017.

risks assumed, violation of state statutes not included, 1011.

statutory provision, 978.

beneficiaries, Ch. XXX, 1053-1060.

dependency of next of kin, gifts not creating dependency, 1110.

necessity of showing, 1104.

what constitutes, 1106.

existence as jurisdictional, 1056.

"next of kin," determination by state law, 1058.

illegitimate children, 1059.

statutory action not for equal benefit of surviving beneficiaries, 1081.

statutory provision, 1053.

survival of beneficiaries, necessity of alleging, 1200.

carriers subject to act, Ch. XXII, 738-773.

cars, hauling empty cars or property as interstate commerce, 763.

use in interstate traffic, materiality, 1288.

comparative negligence, gross negligence of plaintiff and slight negligence of defendant, recovery not prevented, 1039.

theory adopted by Federal Act, difference in theories, 1033.

construction, decisions of federal courts, controlling effect, 731.

violation of Safety Appliance Act, evidence of negligence not required, 1320.

contracts prohibited, Ch. XXXII, 1131-1136.

acceptance of benefits by employe, action against joint tortfeasor not barred, 1134.

application to existing and future contracts, 1133.

limitation of statute to employes of carrier, 1134.

release not a contract within the statute, 1135.

statutory provisions, 1131.

validity, 1132.

contributory negligence under statute, Ch. XXIX, 1028-1052.

apportionment of damages, difference from Georgia statute, 1038.  
manner, 1041.

burden of proof on defendant, 1049.

damages not reduced, violation of Federal Appliance and other statutes, 1048.

**Employers' Liability Act—Continued.**

contributory negligence under statute—continued.

defense, recovery not barred, 1029.

defense under Safety Appliance Act, effect of Liability Act, 1404.

definition, 1029.

distinction from assumption of risk, 1006.

evidence admissible under general denial, 1051.

instructions, duty of court to instruct, 1043.

errors, 1045.

language of statute not erroneous, 1045.

manner of instructing, 1044.

modification by statute, purpose of Congress, 1034.

pleading, necessity, determination by state law, 1050.

proximate cause, recovery prevented where employe's act is sole cause, 1041.

reduction of damages, negligence of employe must be proximate cause of injury, 1039.

statutory provisions, 1028.

damages recoverable, death, 1062; Ch. XXXI, 1061-1130.

abandonment of wife and child, effect on right to recover, 1087.

apportionment, excessive apportionment to one beneficiary, 1126.

apportionment to each beneficiary in verdict, 1129.

compensation, measure of damages, 1073.

necessity of negligence to warrant recovery, 1072.

contributions by deceased, necessity of showing, 1093, 1100.

distribution controlled by Federal statute, 1082.

distribution, settlement by payment of lump sum, 1083.

earning capacity, necessity of evidence, 1092.

elements, loss of care, training of minors, 1089.

loss of society, wounded affections, not elements, 1088.

estate of decedent not entitled to damages, 1091.

exemplary damages not awarded, 1093.

funeral expenses not awarded, 1093.

future earnings not recoverable, 1069.

instructions, reference to sum sued for not error, 1124.

loss of future benefits limited to present cash value, 1075, 1079.

measure of damages, federal decisions controlling, 1073.

instruction held erroneous, 1116.

instructions approved, 1120.

various beneficiaries, 1111.

necessity of pecuniary loss, 1063.

pain and suffering, award where death is not instantaneous, 1066.

limitation of award to pain suffered before death, 1068.

necessity of negligence to warrant recovery, 1072.

no recovery prior to 1910 Amendment, 1070.

no recovery where death is instantaneous, 1071.

**Employers' Liability Act—Continued.**

damages recoverable—continued.

pecuniary loss not dependent on legal liability of employe to beneficiaries, 1082.

pecuniary loss to beneficiaries must be alleged, 1201.

presumption of damages to widow and child, non-existence, 1086.

reduction because of contributory negligence, cure of error by remittitur, 1127.

propriety of special verdicts, 1128.

state statutes entitling father to earnings of children, applicability in determining pecuniary loss, 1126.

state statutes limiting amount recoverable not applicable, 1124.

defects, Amendments of 1910, 713.

demurrer to evidence, state law not controlling, 1220.

effect upon state laws, exclusiveness of Federal Act, 721.

election, cause of action under state law and Federal Act, motion to elect before trial, sustaining, 1231.

motions to elect under Iowa statute, 1229.

no election by widow suing as individual and as administratrix, 1233.

time of sustaining motion to elect, 1227.

employes engaged in interstate commerce,

abandonment of work, effect, 795.

act may constitute interstate employment in one relation and not in another, 778.

bridge workers, 814.

burden of proof upon defendant, 808.

burden of proof upon plaintiff, 807.

carpenters, 814.

coal for engines, dumping into chutes and tenders, 900.

supplying and moving, 897.

construction and repair work, Ch. XXIV, 809-852.

construction work, future use in interstate commerce, 810.

repair of railroads, distinction, 813.

decisions construing Safety Appliance Act, applicability, 800.

drainage, excavating ditches, 834.

effect of employment in both intrastate and interstate commerce, 783.

employment not limited to actual transportation to another state, 778.

erection of foundation for new bridge under old bridge used for interstate commerce, 818.

erroneous decisions holding employment to be interstate, 806.

erroneous decisions holding employment to be intrastate, 803.  
express company's agent, 907.

employment by railroad and express company, 908.

general principles, Ch. XXIII, 774-808.



**Employers' Liability Act—Continued.**

employees engaged in interstate commerce—continued.

going to and from work, employees on premises, 784.

employment in intrastate and interstate commerce, 790.

iron worker carrying material to repair bridge, 815, 818.

limitation of statute to interstate employees, 774.

linemen repairing telegraphs and telephones, 851.

loading and unloading freight, 901.

mail, handling by employees, 904.

material and supplies, procuring for interstate trains, 894.

miscellaneous employees, Ch. XXVI, 894-910.

painters, 849.

police duties, watchmen and detectives, 901.

preparing trains for interstate movement, 860.

presumption, 781.

prior or subsequent employment immaterial 782.

Pullman employees, 908.

question of employment as question of fact, 798.

rails, handling of rails by employees, 826.

removing old rails and storing new ones, 828.

removing bolts from timbers taken from interstate bridges, 819.

repairs,

buildings, depots and roundhouses, employment not interstate, 835.

cars and engines, 841, 849.

temporary delay, 842.

cars, employment not interstate, 847.

shopmen in terminal yards, 843, 845, 847.

engines in roundhouses, 843, 845, 847.

employment not interstate, 847.

shops, roundhouses and other buildings, 836, 840.

tracks, handling ballast, gravel, etc., 833.

sectionmen and track laborers, 821.

side tracks, spurs and switches, 823.

turn tables, 824.

survey of track to improve road, 826.

switching crews, cars loaded with lumber for repair and construction work, 890.

cars to be loaded with interstate freight, 881.

illustrations, 891.

interstate cars into or out of interstate trains, conflicting decisions, 867.

federal control under United States decision, 871.

test in determining interstate employment, 873, 877.

"making up," and "breaking up," trains in yards, 866.

making up trains of other companies, 891.

moving cars between interstate journeys, 886.

**Employers' Liability Act—Continued.**

employees engaged in interstate commerce—continued.

- moving intrastate cars, 879.
- repair of loaded cars, 885.
- termination of interstate journey, receipt by consignee, 884.
- temporary cessation of work, effect, 795.
- termination of interstate status by delivery of cars at destination, 887.
- termination of work, sleeping in cars, 792.
- tests adopted by United States Supreme court, 779.
- ties, laborers handling ties, 831.
- train and switching crews, Ch. XXV, 853-893.
- trainmen, beginning and end of federal control, 863.
  - interstate trains, 853.
  - not engaged in interstate commerce, 857.
  - return trips by trains carrying out interstate freight, 865.
- transportation of employe's own property not subject to statute, 796.
- weighing cars after unloading, 883.
- wrecks, removing débris and constructing temporary tracks, 825.
- yard clerks, 903.
- evidence, Ch. XXXVII, 1219-1226.
  - admissibility, testimony of widow or other beneficiaries, determination by law of forum, 1219.
  - controlling effect of state law, 1219.
  - interstate shipments, orders of Interstate Commerce Commission, statutory provisions, 1220.
- express companies not common carriers by railroad, 757.
- extent of power exercised by Congress in enacting statute, 717.
- fellow-servant rule, abolition as to interstate employes, 736.
- former adjudication, action under state law as bar to action under Federal Act, 1241.
  - commencement of action under state law not bar to suit under Federal Act, 1240.
- interstate commerce,
  - beginning and ending, 760.
  - destination in same state, passage through another state, 766.
  - evidence held not sufficient to show, 1224.
  - evidence held sufficient to show, 1223.
  - evidence of employment in interstate commerce as evidence of railroad engaging in interstate commerce, 772.
  - general rule as to when railroad company is engaged in, 738.
  - method of proving engagement in, employes, 1223.
    - train and switching crews, 1221.
  - point of shipment, reshipments from point of delivery, interstate character of shipment not changed, 770.

**Employers' Liability Act—Continued.**

interstate commerce—continued.

reshipments from point of delivery, change of interstate character of shipment, 767.

intrastate employes not entitled to benefit of statute, 975.

judgment notwithstanding verdict, power of state courts to direct, action under Federal Act, 1246.

jurisdiction of state and Federal courts, Ch. XXXIV, 1145-1169.

limitation of actions, Ch. XXXIII, 1137-1144.

accrual of cause of action, death cases, 1142.

condition precedent to recovery, 1137.

estoppel or fraud may not avoid limitation period, 1140.

insanity of injured employe, period not extended, 1141.

petition, cause of action under state law, recovery under Federal Act, omission supplied by answer, 1186.

plea not required when suit is barred, 1138.

pleading, amendments allowed after two-year period, 1215.

amendment setting up new cause of action not allowed, action barred, 1210.

Safety Appliance Act, effect of provision of Liability Act, 1422.

state statute, effect in absence of interstate employment, 1423.

statutory provision, 1137.

submission of question of limitation to jury as error, 1143.

time of commencement as question of procedure, 1143.

master and servant, power of Congress to regulate, scope, nature and extent of power, 689.

negligence, Ch. XXVII, 911-977.

acts of employes and defects of equipment used in intrastate commerce as cause of injury, 973.

criterion of liability, ordinary care of railroads required, 914.

definition by United States Supreme court, 926.

determination according to decisions of Federal courts, conflict of decision, 928.

final decision of Supreme court, 933.

duty imposed by Safety Appliance Act, violation causing injury as authorizing recovery under Liability Act, 921.

evidence, direct or positive proof not required, 925.

facts held not to show actionable negligence, 969.

facts held to show actionable negligence, 962.

sufficiency not governed by decisions of state courts, 949.

injury caused by servant acting within scope of employment, necessity, 936.

injury or death due, "in whole or in part," to negligence, meaning of phrase, 945.

liability of railroad for acts of officers or employes, statute not limited to acts of common law fellow-servants, 924.

minors, prohibition of employment by state laws, effect in determining negligence, 950.

**Employers' Liability Act—Continued.**

negligence—continued.

proximate cause, carrier's liability for injury due in whole or in part from negligence, 955.

injury due solely to act of employes, no recovery, 959.  
illustrations, 961.

necessity, 942.

res ipsa loquitur, applicability of rule, conflict of decisions, 951.

state statute creating presumption of negligence, applicability of Mississippi statute, 948.

statute imposing liability, 912.

statutes not applicable, 946.

negligence of officers, agents or employes, defects of equipment, 912.

willful wrongs not within act, 976.

new trial, propriety of granting, 1245.

parent and child, common law rights, recovery for loss of services, law superseded by Federal Act, 728.

parents not entitled to damages when there is widow or children, 1054.

parties, Ch. XXXV, 1170-1178.

death cases, ancillary administrator may sue, 1175.

revival of suit by personal representative only, 1176.

suit only by personal representative, 1170.

want of legal capacity to sue in widow cannot be waived, 1173.

widow cannot sue although sole beneficiary, 1172.

parties defendant, agents and servants causing injury, non-liability, 1177.

lessor of railroad, 1177.

personal representative, action in state other than where appointed, existence of other property not necessary for appointment, 1176.

necessity of consent, 1178.

petition, cause of action under Federal Act, etc.—continued.

sufficient, 1199.

no recovery under state statute, 1183.

cause of action under state law and Federal Act, different counts, 1193.

cause of action under state law, evidence showing case under Federal Act, recovery, harmless error, 1189.

necessity of pleading Federal Act to prevent recovery, 1207.

recovery prevented, 1204.

recovery under federal statute, omissions supplied by answer, 1186.

cause of action under state or common law, applicability of Federal Act may be raised by answer, 1203.

death cases, pecuniary loss to beneficiaries must be alleged, 1201.

survival of beneficiaries, necessity of alleging, 1200.

**Employers' Liability Act—Continued.**

- petition, cause of action under Federal Act, etc.—continued.
  - interstate commerce, allegations as to engagement in held sufficient, 1197.
  - necessity of showing injury or death under conditions of Federal Act, 1179.
  - reference to statute not required, facts showing liability, 1195.
- pleading, Ch. XXXVI, 1179-1218.
  - sufficiency, state law controlling, 1197.
- practice under statute, Ch. XXXVIII, 1227-1248.
- procedure, state laws, controlling effect, 733.
- purpose of statute, uniformity and modification of common law, 706.
- railroads,
  - application of act,
  - bridges, ferries and tracks included, 739.
  - carriers engaged in foreign commerce, 749.
  - carrying passengers only, 754.
  - interurban electric railroads, 752.
  - lessor of railroad, interstate commerce, 750.
  - railroad wholly within single state, 742.
  - receivers of railroads, 756.
  - tap lines and logging roads, 740.
  - territories, railroad and employes within, 758.
  - vessels or ships not parts of railroad systems, 754.
- regulations of Congress, common law of state courts superseded, 59.
  - interstate commerce, subject matter covered, difficulty of defining, 57.
- remedies, employes on vessels owned by railroads not included, 730.
  - limitation to employes of railroads, 729.
- removal of causes, actions in state courts not removable to federal courts, 1148.
  - petition not stating cause of action under Federal Act although so intended, 1152.
  - petition stating cause of action under state and federal statutes, 1149, 1150.
- Safety Appliance Act, contributory negligence as defense, effect of Liability Act, defense abolished, 1406.
  - distinction from Liability Act, intrastate commerce, 1268.
  - remedial provisions not limited to employes, 1269.
- scope, validity and effect of act, Ch. XXI, 689-737.
- settlement, power of administrator to settle without court's consent, 1247.
- settlement with one beneficiary, action by personal representative not defeated, 1128.
- sleeping car companies not common carriers by railroad, 756.
- street railroads not subject to act, 755.

**Employers' Liability Act—Continued.**

- text of statute as amended, 1590-1592.
- venue, action may be brought in federal courts, 1145.
- actions may be brought in state courts, 1146.
- verdicts, less than twelve jurors, validity, state laws permitting, 1236.
- Workmen's Compensation Acts, state laws superseded by Federal Act, extent, 726.

**Empty cars, see CARS.****Engineers,**

- air brakes, former and present requirements, Safety Appliance Act, 1328.
- recovery for injury caused by collision, failure of brakes to work, 1333.
- appliances, ordinary care, custom of other railroads not conclusive as to care exercised, Employers' Liability Act, 927.
- assumption of risk, employes held not to have assumed risk, Employers' Liability Act, 1024.
- employes held to have assumed risk, 1018.
- instruction applicable to evidence, necessity of giving, 1015.
- employes engaged in interstate commerce, erroneous decisions holding employment to be intrastate, Employers' Liability Act, 803.
- preparing trains for interstate movement, 860.
- switching crews, illustrations, 891.
- trainmen, beginning and end of federal control, 863.
- trainmen not engaged in interstate commerce, 857.
- trainmen on interstate trains, 853.
- Hours of Service Act, carriers and employes subject to, 1434.
- interstate commerce, evidence held sufficient to show, Employers' Liability Act, 1223.
- negligence, evidence held to show actionable, Employers' Liability Act, 962.
- proximate cause, injury due solely to act of employes, no recovery, illustrations, 961.

**Engines,**

- see LOCOMOTIVES.

**Equity,**

- war, federal control of carriers during war with Germany, actions, right to sue carriers under federal control, 129.

**Estates of decedents,**

- beneficiaries under Employers' Liability Act, 1053.
- apportionment of damages to each beneficiary in verdict, 1129.
- damages recoverable, compensatory damages, measure, 1073.

**Estates of decedents—Continued.****beneficiaries under Employers' Liability Act—continued.**

- estate of decedent not entitled to damages, 1091.
- existence as jurisdictional, 1056.
  - measure of damages, instructions held erroneous, 1116.
  - negligence, necessity of negligence to warrant recovery, 1072.
  - statutory provision, 1062.
- election, cause of action under state law and Federal Act, motion to elect before trial, sustaining, 1231.
  - no election by widow suing as individual and as administratrix, 1233.
- limitations, pleading, amendments allowed after two-year period, 1215.
- necessity of showing dependency of next of kin, 1104.
- "next of kin," determination by state law, 1058.
  - illegitimate children, 1059.
  - what constitutes, 1106.
- parents not entitled to damages when there is widow or children, 1054.
- parties, ancillary administrator may sue, 1175.
  - revival of suit by personal representative only, 1176.
  - suit only by personal representative, 1170.
  - widow cannot sue although sole beneficiary, 1172.
- personal representative, action in state other than where appointed, necessity of consent, 1178.
  - existence of other property not necessary for appointment, 1176.
- petition, necessity of showing Federal Act to prevent recovery, 1207.
- settlement, power of administrator to settle without court's consent, Employers' Liability Act, 1247.
- settlement with one beneficiary, action by personal representative not defeated, 1128.

**Estoppel,**

- former adjudication, action under state law as bar to action under Employers' Liability Act, 1241.
- limitation of actions, Employers' Liability Act, estoppel or fraud may not avoid limitation period, 1140.
- rates, publication and filing, changes prohibited, defenses of estoppel and waiver not available, actions against shippers for under charges, 470.
- collection of scheduled rates mandatory, 466, 469.

**Evidence,**

- admissibility,
  - accounts, records and memoranda of carriers, control of Commerce Commission, 185, 656.

**Evidence—Continued.**

admissibility—continued.

contributory negligence, evidence admissible under general denial, Employers' Liability Act, 1051.

employees engaged in interstate commerce, Employers' Liability Act, prior or subsequent employment immaterial, 782.

orders of Interstate Commerce Commission, Employers' Liability Act, 1220.

reports of accidents, Boiler Inspection Act, 1498.

Accident Reports Act, 1505.

text of Accident Reports Act, 1672.

testimony of widow or other beneficiaries, determination by law of forum, Employers' Liability Act, 1219.

appeal, writ of error, review of evidence, Employers' Liability Act, 1160.

burden of proof,

assumption of risk, Employers' Liability Act, 1017.

contributory negligence, Employers' Liability Act, 1049, 1050.

employees engaged in interstate commerce, Employers' Liability Act, 807, 808, 865.

exceptions to Hours of Service Act, 1486.

harmless errors, actions under Employers' Liability Act, 1243.

loss and damage by carriers, 594.

carrier's liability as warehouseman, 593.

delay and act of God destroying property, federal rule as to negligence, 595.

quantum of proof, necessity to establish liability, Carmack Amendment, 594.

rates, penalty for making erroneous quotation of rate, damage to shippers, 473.

suspension of advance by Interstate Commerce Commission, investigation, 639.

repairs, movement of cars for repairs, exception to Safety Appliance Act, 1391.

violation of Safety Appliance Act, 1426.

discrimination, evidence of injury, 320.

Employers' Liability Act, evidence, Ch. XXXVII, 1219-1226.

cause of action under state law, recovery where evidence shows case under Federal Act, harmless error, 1189.

controlling effect of state law, 1219.

exhibition of model couplers, Safety Appliance Act, 1362.

information relating to business of interstate shippers, prohibition against carriers and agents giving, amendment to Interstate Commerce Act, 194.

Interstate Commerce Act, publication of reports of Commission, 161.

Interstate Commerce Commission, compelling production of papers, 679.

hearing, briefs, rules governing filing, 681.



**Evidence—Continued.**

Interstate Commerce Commission, etc.—continued.

method, 677.

testimony, invalid provision of statute remedied by enactment of Compulsory Testimony Act, 162.

transcripts of testimony before Commerce Commission, furnishing two parties, 681.

judicial notice, see JUDICIAL NOTICE.

negligence, direct or positive proof not required, Employers' Liability Act, 925.

"preponderance of evidence," definition, actions for penalties under Safety Appliance Act, 1427.

presumptions,

damages for violation of Interstate Commerce Act, past shipments with excess rates, damages not automatically awarded, 509.

Employers' Liability Act,

assumption of risk, 993.

cause of action under state or common law, application of Federal Act may be raised by answer, 1203.

death, abandonment of wife and child, effect as to recovery, 1087.  
presumption of damages to widow and child, non-existence, 1086.

employees engaged in interstate commerce, 781.

negligence, presumption created by state statute not applicable, 946.

applicability of Mississippi statute, 948.

res ipsa loquitur, applicability, conflict of decisions, 951.

loss and damage, presumption of negligence against initial carriers, 601.

presumption of negligence of terminal carriers, conflict of decisions, 600.

rates, courts bound by published rates until set aside by Interstate Commerce Commission, 462.

knowledge of published schedules by shippers and passengers, 460.

reasonableness, illegality if another locality is prejudiced, 379.  
Safety Appliance Act, violation as negligence per se, 1306.

schedules, contracts and annual reports, filing with Commission,  
public records as prima facie evidence, 680.

production of books and papers, see PRODUCTION OF BOOKS AND PAPERS.  
rules of Interstate Commerce Commission, 1581.

power to formulate, 671.

sufficiency,

automatic couplers, violation of Safety Appliance Act, illustrations, 1341.

custom of other railroads not conclusive as to care exercised, appliances, Employers' Liability Act, 927.

**Evidence—Continued.**

sufficiency—continued.

demurrer to evidence, state law not controlling, Employers' Liability Act, 1220.

Employers' Liability Act, dependency of next of kin not created by gifts, 1110.

earning capacity, necessity of evidence of deprivation, 1092.

negligence, facts held to show actionable negligence, 962.

sufficiency not governed by decisions of state courts, 949.

violation of Safety Appliance Act, evidence of negligence not required, 1320.

interstate commerce, Employers' Liability Act, 1223, 1224.

evidence of employment in interstate commerce as evidence of railroad engaging in interstate commerce, 772.

method of proving engagement in, 1221, 1223.

variance, Employers' Liability Act, controlling effect of state laws, 733.

petition showing cause of action under state law, evidence showing case under Federal Act, recovery prevented, 1204.

necessity of showing Federal Act to prevent recovery, 1207.

**Explosion,**

assumption of risk, instruction applicable to evidence, necessity of giving, Employers' Liability Act, 1015.

employees engaged in interstate commerce, repair of tracks, handling ballast, gravel, etc., Employers' Liability Act, 833.

**Explosives,**

interstate transportation, federal control, 298.

regulations, Commerce Commission may formulate, 655.

text of federal statute, 1676.

**Express companies,**

carriers subject to Interstate Commerce Act, Hepburn Amendment, 255.

statutory provision, 201.

discrimination, exclusive privileges, auxiliary facilities at stations and terminal grounds, legality, 339.

rates to other carriers as shippers, preferences prohibited, 360.

duties 28-Hour Live Stock Law, 1487, 1669.

violation of law, penalties, 1489.

Employers' Liability Act, express companies not included, 757.

employees engaged in interstate commerce, agent, Employers' Liability Act, 907.

employment by railroad and express company, 908.

federal control, scope, historical review, effect of Interstate Commerce Act, 137.

**Express companies—Continued.**

federal control, scope, historical review, etc.—continued.

state and national control, general principles determining, illustration, 44.

feeding animals at expense of owner, unloading pursuant to 28-Hour Live Stock Law, 1489.

free passes, prohibition of giving of passes by Hepburn Act, exceptions, 181.

interstate transportation, Interstate Commerce Act not applicable to all interstate commerce, 300.

transportation for express companies, Safety Appliance Act, 1304.

licenses, imports from foreign states, immunity from state legislation, protection of commerce clause, 20.

regulations by states or municipalities invalid, interstate commerce, 106.

regulations of traffic, invalidity of restrictions of commerce, 107.

**F.****Federal statutes,**

see specific titles such as ACCIDENT REPORTS ACT; BILL OF LADING ACT; ELKINS ACT; INTERSTATE COMMERCE ACT; EMPLOYERS' LIABILITY ACT; SAFETY APPLIANCE ACT; HOURS OF SERVICE ACT; TWENTY-EIGHT-HOUR LIVE STOCK LAW.

**Federal treasurers,**

duties, etc., order of director general of railroads, 1772, 1774.

**Ferries,**

carriers subject to Interstate Commerce Act, 214.

arrangement with carrier by rail, 214.

competing water lines, control or ownership of carrier by rail, prohibition, 224.

Hours of Service Act, carriers and employes subject to, 1434.

Interstate Commerce Commission, extension of power of Commission and scope of Interstate Commerce Act by Hepburn Act, 166.

licenses, imports from foreign states, immunity from state legislation, commerce clause, 19.

"railroad" including ferry,

Employers' Liability Act, 739.

vessels or ships not parts of railroad systems, 754.

Hours of Service Act, 1444.

Interstate Commerce Act, 214, 300.

rates for transportation, power of state to establish, absence of federal legislation, 94.

publication and filing, vehicles on railroad ferries, 483.

regulation, state and national control, general principles determining, 45,

**Fertilizer,**

rates, discrimination, different uses of commodities, different rates not justified, 413.

**Fire,**

explosives, interstate transportation, federal control, 298.  
loss and damage, carrier's liability as warehouseman, nature, 593.  
contracts against loss by fire not due to negligence, 576.

**Fireman,**

actions under Employers' Liability Act,  
employees engaged in interstate commerce, abandonment of work, effect, 795.  
coal for engines, supplying and moving, 897.  
going to and from work, employees on premises, 784.  
"making up" and "breaking up" trains in yards, 866.  
preparing trains for interstate movement, 860.  
switching crews moving intrastate cars, 879.  
switching interstate cars into or out of interstate trains, 873, 877.  
trainmen not engaged in interstate commerce, 857.  
trainmen on interstate trains, 853.  
negligence, evidence held not to show actionable negligence, 970,  
evidence held to show actionable negligence, 965.  
petition, allegation as to engagement in interstate commerce held sufficient, 1197.  
Hours of Service Act, carriers and employees subject to, 1434.  
watching locomotive as being "on duty," firemen engaged in movement of trains, 1458.

**Flagman,**

action for injury or death, Employers' Liability Act,  
employees engaged in interstate commerce, 901.  
presumption of negligence created by state statute not applicable, 946.  
proximate cause, injury due solely to act of employee, no recovery, 959.

**Food,**

discrimination in shipment,  
cars prepared, refusal of service to other shippers, 362.  
increased rates on domestic traffic, 334.  
prejudice to one party and advantage to others, 314.  
"rebate" defined, distinction between ordinary and statutory definition, 313.  
transit privileges, 353.  
illegitimate subjects of trade and commerce, prohibition of importation or exportation by states, 26.  
interstate shipments,

**Food—Continued.**

interstate shipments—continued.

loading, dunnage, and special preparation of freight cars for shipment, duties of shippers, 287.

reshipments from point of delivery, change of interstate character of shipment, Employers' Liability Act, 767.

shipment from one foreign country to another foreign country, passage through United States, not subject to Interstate Commerce Act, 282.

temporary interruption of shipments, interstate character not changed, 276.

rates, publication and filing, collection of scheduled rates mandatory, illustrations, 469.

**Foreign commerce,**

Adamson Eight-Hour Wage Law, railroads and employes excepted, 1507.

authority of Congress, regulations, 3.

Bill of Lading Act, constitutionality of statute, 610.

Boiler Inspection Act, carrier's duties and obligations, 1492.

employes and railroads subject to, 1491.

definition, Accident Reports Act, 1504.

text, 1673.

discrimination, increased rates on domestic traffic, export traffic between ports of entry and inland points, 331, 332.

railroad discriminating against steamship lines, power of Interstate Commerce Commission, 657.

Employers' Liability Act, application to carriers engaged in foreign commerce, 749.

general rule as to when railroad is engaged in foreign commerce, 738.

explosives, transportation, text of federal statute, 1676.

interstate commerce, method of proving engagement in, Employers' Liability Act, 1223.

Interstate Commerce Act,

refrigeration and ventilation of cars, duty of carriers, 291.

shipment from one foreign country to another foreign country, passage through United States, 282.

shipment from one state to port in same state, transshipment for exporting, 281.

text, 1513-1552.

transportation from United States to adjacent foreign countries, carriers subject to act, 210.

wharves and connecting tracks; federal control, 295.

judicial construction of commerce clause, early decision, 5.

loss and damage, initial carrier's liability, bill of lading not issued, effect, 583.

carriers affected by Cummins Amendment, 563.

**Foreign commerce—Continued.**

loss and damage, initial carrier's liability, etc.—continued.

commencement of duties, delivery of property for transportation, 581.

Cummins Amendments, export and import shipments to and from foreign countries not adjacent to United States, 570.

master and servant, power of Congress to regulate, scope, nature and extent of power, 689.

orders of director general of railroads, federal control, 1678-1783.

rates, charges by shippers for services rendered, control of Commerce Commission, 653.

through routes and joint rates, establishment by commission, transportation to foreign countries, 649.

"regulation" of foreign commerce, 14,

switching service at ports subject to Interstate Commerce Act, 297.

**Forgery,**

Federal Bill of Lading Act, leading provisions, 618.

**Former adjudication,**

action under state law as bar to action under Employers' Liability Act, 1241.

commencement of action under state law not bar, 1240.

damages for violation of Interstate Commerce Act, award by Commission as bar to action for additional damages, 513.

loss and damage to interstate shipments, action against connecting carrier barred by recovery against initial carrier, 553.

**Forms,**

approved forms, Interstate Commerce Commission, 1585-1589.

extension of time, written request of owner, 28-Hour Live Stock Law, 1488.

**Franchises,**

acceptance of conditions, municipal ordinances, regulation of passenger rates, invalidity, 67.

**Fraud,**

Bill of Lading Act, leading provisions, 618.

contracts, prohibition of Employers' Liability Act, release not a contract within statute, 1135.

limitation of actions, Employers' Liability Act, fraud may not avoid limitation period, 1140.

loss and damage by shippers, fraudulent claims against carriers penalized, 189.

money paid to shipper by initial carrier, binding effect on other carriers in absence of fraud, 552.

text of Interstate Commerce Act, 1524.

**Funerals,**

death, damages recoverable under Employers' Liability Act, funeral expenses not recoverable, 1093.

**G.****Gambling,**

lottery, transportation of tickets from one state to another as interstate commerce, 11.

**Game,**

illegitimate subjects of trade and commerce, prohibition of importation or exportation by states, 27.

**Gardener,**

employees engaged in interstate commerce, Employers' Liability Act, 909.

**Garnishment,**

prohibition of remedy, order of director general of railroads, 1783.

**Gas,**

interstate transportation,

Interstate Commerce Act not applicable to all interstate commerce, 300.

pipe line companies, subjection to Interstate Commerce Act, 241.

transportation from one state to another as essential element, 10.

**Gear,**

orders of Interstate Commerce Commission, boiler inspection, 1656-1662.

**Georgia,**

contributory negligence, damages, apportionment under Employers' Liability Act, difference from Georgia statute, 1038.

**Gifts,**

beneficiaries under Employers' Liability Act, dependency not created by gifts, 1110.

valuation of property of interstate carriers, duty of Interstate Commerce Commission under Act of 1913, 195.

**Gondola cars,**

see CARS.

**Grab irons,**

see HANDHOLDS.

**Grain,**

discrimination in shipment,

classification of freight, differential between raw material and manufactured products, no discrimination, 405.

**Grain—Continued.**

discrimination in shipment—continued.

grain elevator service, allowance to shipper owning elevator, 364.  
preferences prohibited, 363.

rates, absorbing switching charges at one point and refusing at another, 388.

differentials between Atlantic coast cities, 390.

"like traffic," wheat and coarse grain, different rates, 412.

rebilling and reshipping grain, denial of privilege to other cities, 393.

reduced rates for shipments by train loads, small shippers subjected to undue disadvantage, 330.

transit privileges, 353.

interstate commerce, change of destination in transit, 270.

grain elevation service, regulation under federal control, 286.

temporary stopping or interruption of shipments, change into intra-state commerce, 273.

transit privileges, control of Interstate Commerce Commission, 285.

rate for transportation, increase, order of director general of railroads, 1739, 1745.

publication and filing, collection of scheduled rates mandatory, 469.

damages for failure to post rates not recoverable, 478.

privileges furnished shippers and not specified in schedule unlawful, 444.

**Gravel,**

employees engaged in interstate commerce, repair of tracks, handling gravel, etc., Employers' Liability Act, 833.

**Guardian,**

Employers' Liability Act, limitation period not extended by insanity of injured employee, 1141.

**Gunpowder,**

see EXPLOSIVES.

**H.****Handholds,**

agitation for safety appliances on all cars, 1260.

carrier's duty, Safety Appliance Act, Ch. XLV, 1363-1375.

construction of Safety Appliance Act, custom of railroad, effect in construing, 1267.

duty to furnish mandatory, 1368.

grab irons,

necessity, 1365.

foreign and domestic cars, no distinction, 1367.

provision of Safety Appliance Act, extension, 1364.

substitutes unlawful, 1367.



**Handholds—Continued.**

grab irons—continued.

use for other purposes than coupling, protection of Safety Appliance Act, 1366.

Interstate Commerce Commission, authority to standardize appliances, Amendments of 1910, Safety Appliance Act, 1260.

order of Commission, 1262, 1602.

purpose of Congress in authorizing Commission to prescribe standard equipment, 1375.

interstate commerce, interurban electric railroads engaged in, 1296.  
knowledge of defect by employe not required, 1371.

suit not barred, 1402.

necessity, effect of order of Interstate Commerce Commission, 1373.

foreign and domestic cars, no distinction, 1367.

punishment of crime against two sovereignties, rule not applicable, Safety Appliance Act, 1279.

reduction of injury, purpose of enacting Safety Appliance Act, 1265.  
requirements, original Safety Appliance Act, 1363.

extent of requirement of act, 1372.

Safety Appliance Act, original act, summary, 1255.

text, 1593.

state laws, invalidity as to cars of interstate railroads, 1278.

substitution for appliances unlawful, 1312, 1367.

"trains" within Safety Appliance Act, what constitutes, 1330.

**Harbors,**

discrimination,

equality required of carriers in dealing with shippers, equal facilities to be afforded, 324.

grant of wharfage privilege denied to other shippers, 351.

rates, carriers not participating in rates to favored locality not guilty, 385.

interstate transportation, shipment from one state to port in same state, transshipment for exporting, 281.

wharves and connecting tracks, federal control, 295.

railroads, application of Employers' Liability Act to carriers engaged in foreign commerce, 749.

rates, maximum rates to and from ports, establishment by Commission, 659.

**Haul,**

rates,

long and short haul, amendment to Interstate Commerce Act, 191.

reduced rates for longer than for shorter distance, Commission may authorize, 651.

"use" of cars and "haul," distinction eliminated by 1903 Amendment, Safety Appliance Act, 1304.

**Headlights,**

state laws superseded by Boiler Inspection Act as amended, 1500.

**Health,**

death, damages recoverable under Employers' Liability Act, compensatory damages, measure, 1073.

various beneficiaries, 1111.

diseases of animals, invalidity of federal laws and regulations encroaching upon state's power, 49.

illegitimate subjects of trade and commerce, prohibition of importation or exportation by states, 26.

quarantine, state and national control over interstate transportation, general principles determining, 47.

**Hearings,**

rules of Interstate Commerce Commission, 1579.

**Hepburn Act,**

accounts, records and memoranda of interstate carriers under jurisdiction of Commission, 185.

allowances to shippers for services rendered in connection with transportation, 180.

authority of Commission to prescribe through routes and joint rates, 176.

carriers prohibited from having interest in freight transported, Commodity Clause, 175.

carriers, subjection to Interstate Commerce Act, 240.

cars for interstate shipment, state regulations superseded by Hepburn Act, 75.

"common control, management or arrangement for a continuous carriage or shipment," definition and explanation of term, 216.

discrimination, interchange of traffic, use of terminal facilities, denial of use to certain carriers, 334.

transit privileges, 353.

Employers' Liability Act, limitation to railroads; bridges, ferries and tracks included, 739.

express companies, regulation by states or municipalities invalid, 106.

subject to Interstate Commerce Act, 255.

extension of scope of Interstate Commerce Act and powers of Commission, 166.

prohibition of free passes, persons excepted, 181.

railroads wholly within state, federal control, 207.

rates, publicity of rates and adherence to published rates, 433.

refrigeration and ventilation of cars by carriers, duties, 291.

sleeping car companies, subjection to Interstate Commerce Act, 258.

switch connection with private side tracks and lateral branch lines, power of Commission to order, 171.

**Hepburn Act—Continued.**

wharves and connecting tracks, federal control under Interstate Commerce Act, 295.

**Highways,**

municipal corporations, regulations of traffic, invalidity of restrictions of commerce, 107.  
speed of trains, invalidity of statute as to speed of trains as burdening interstate commerce, 88.

**Hopper cars,**

see CARS.

**Hostler,**

employee engaged in interstate commerce, Employers' Liability Act, 900, 901.

**Hours of service,**

Adamson Law, Ch. LVI, 1507-1509.  
commission to observe, appointment by President, 1508.  
eight hours as basis of day's work, 1507.  
penalties, violation of law, 1509.  
railroads and employees excepted, 1507.  
reduction of wages pending report of commission prohibited, 1508.  
text, 1674.  
validity, 1509.  
Board of Adjustment, order of director general of railroads, 1692, 1748.  
wages, increase, order of director general of railroads, 1709-1734.  
supplementary orders, 1756-1769.

**Hours of Service Act,**

additional hours of service, emergency, insubordination of employee as emergency, 1484.  
operators, 1482.  
application, when statute is not applicable, 1471.  
definition of "casualty," "unavoidable accident" and "act of God," 1473.  
carriers subject to statute, 1434.  
"casualties," derailments and collisions, exceptions to statute, 1478.  
certainty, statute not void for uncertainty, 1439.  
collision, exceptions to statute, 1478.  
compliance with, order of director general of railroads, 1685.  
constitutionality of statute, 1437.  
classification of operators, statute not invalid, 1439.  
construction of statute, remedial statute to be liberally construed, 1443.  
continuity, breaking of, brief periods off duty, 1450.  
relief from duty for definite period of two hours, 1453.

**Hours of Service Act—Continued.**

- delay, ordinary delay incident to train operation, not excuse for violation of statute, 1481.
- derailments, exceptions to statute, 1478.
- employees subject to statute, 1434.
- evasion of statute, statute may not be violated by requiring different service after statutory period, 1446.
- excuses and exceptions, 1470-1486.
  - burden of proof upon carrier, 1486.
  - high degree of diligence of carrier required, 1475.
- federal control, employees of interstate carriers, 1432.
- limitations upon hours of service, 1447-1470.
  - handling orders affecting train movements, 1462.
  - moving trains, 1447.
  - "on duty," commencement and termination of service, 1448.
  - telegraph offices operated during day and part of night, 1467.
  - when statute is not applicable, 1471.
  - definition of "casualty," "unavoidable accident" and "act of God," 1473.
- operators, limitation upon hours of service, 1462.
  - additional hours of service, emergency, 1482.
  - insubordination of employe as emergency, 1484.
- separate periods of service, statutory period not exceeded, 1468.
- telegraph offices, two offices in one community as one "place," 1469.
- tower men and switch tenders, 1463.
- purpose of Congress in enactment, 1442.
- purpose, scope and validity of statute, Chapter LI, 1431-1446.
- railroad, definition, 1444.
- relief crews, duty to substitute, prevention of excessive hours, 1454.
- reports, power of Interstate Commerce Commission, monthly reports showing violation of statute, 1440.
- state control, employees of interstate carriers, 1432.
- telegraph offices, operation during day and part of night, limitations upon hours of service, 1467.
  - separate periods of service, statutory period not exceeded, 1468.
  - two offices in one community as one "place," 1469.
- text of statute, 1633, 1634.
- train crews, limitation upon hours of service, 1447.
- violation of act,
  - appeal, writ of error, evidence insufficient to show liability, Employers' Liability Act, 1160.
  - assumption of risk, defense not available, action under Employers' Liability Act, 1012.
  - contributory negligence, damages not reduced, violation of Federal statutes causing injury, action under Employers' Liability Act, 1048.
  - duty of Interstate Commerce Commission, 1444.

**Hours of Service Act—Continued.**

violation of act—continued.

negligence, proximate cause of injury, necessity, Employers' Liability Act, 944.

penalties, 1444.

separate penalty for each employe kept on duty beyond statutory period, 1444.

watching locomotive as being "on duty," firemen engaged in movement of trains, 1458.

**Husband and wife,**

Employers' Liability Act,

abandonment of wife and child, effect as to recovery, 1087.

pecuniary loss not dependent on legal liability of employe to beneficiaries, 1082.

alien dependents, recovery, 1055.

appeal, federal question, petition not stating good cause of action, 1166.

beneficiaries, 1053.

contributions by deceased, necessity of showing, 1093, 1100.

dependency of next of kin not created by gifts, 1110.

existence as jurisdictional, 1056.

"next of kin," determination by state law, 1058.

statutory action not for equal benefit of surviving beneficiaries, 1081.

damages,

apportionment to each beneficiary in verdict, 1129.

compensatory damages, measure, 1073.

distribution controlled by Federal statute, 1082.

settlement by payment of lump sum, 1083.

earning capacity, necessity of evidence of deprivation, 1092.

elements, loss of care, training of minors, 1089.

loss of society and wounded affections not elements, 1088.

loss of future benefits limited to present cash value, 1075, 1079.

measure of damages, instructions approved, 1120.

instructions held erroneous, 1116.

various beneficiaries, 1111.

necessity of pecuniary loss, 1063.

pain and suffering, award where death is not instantaneous, 1066.

compensation for loss, future earnings not recoverable, 1069.

limitation to pain suffered before death, 1068.

no recovery prior to 1910 Amendment, 1070.

presumption of damages to widow and child, non-existence, 1086.

statutory provision, 1062.

election, cause of action under state law and Liability Act, motion to elect before trial, sustaining, 1231.

no election by widow suing as individual and as administratrix, 1233.

**Husband and wife—Continued.****Employers' Liability Act—continued.**

former adjudication, action under state law as bar to action under Federal Act, 1241.

limitations, pleading, amendments allowed after two-year period, 1215.

amendment setting up new cause of action not allowed, 1210.

parents not entitled to damages when there is widow or children, 1054.

parties, ancillary administrator may sue, 1175.

suit only by personal representative, 1170.

want of legal capacity to sue in widow cannot be waived, 1173.

widow cannot sue although sole beneficiary, 1172.

petition, cause of action under state law, necessity of showing Federal Act to prevent recovery, 1207.

survival of beneficiaries, necessity of alleging, 1200.

removal of causes, petitions not stating cause of action under Federal Act although so intended, 1152.

text of statute as amended, 1590-1592.

**I.****Ice,**

employees engaged in interstate commerce, procuring material and supplies for interstate trains, Employers' Liability Act, 894.

refrigeration and ventilation of cars, duty of carriers, Interstate Commerce Act, 291.

removal of ice, assumption of risk, employees held not to have assumed risk, Employers' Liability Act, 1023.

employees engaged in interstate commerce, abandonment of work, effect, Employers' Liability Act, 795.

**Immigrants,**

discrimination, lower rates to settlers, legality, 421.

**Independent contractors,**

Employers' Liability Act, remedies, limitation to employees of railroads, 729.

**Industrial railroads,**

common carriers, distinguished from industrial railways, plant facilities, 203.

logging roads, subjection to Interstate Commerce Act, 238.

private car lines, subjection to Interstate Commerce Act, 240.

compensation of employees, Adamson Eight-Hour Law, exceptions, 1507.

discrimination, joint through rates, divisions to tap lines or logging roads, 349.

**Industrial railroads—Continued.**

- Employers' Liability Act, application to railroads; bridges, ferries and tracks included, 739.
- tap lines and logging roads, 740.
- interstate commerce, industrial railroads engaged in, Safety Appliance Act, 1298.
- terminal and belt railroads, subsection to Interstate Commerce Act, 234.
- transferring cars to industrial track, Safety Appliance Act, 1305.
- wharves and connecting tracks, federal control under Interstate Commerce Act, 295.
- new industry tracks, order of director general of railroads, 1696.

**Infants,**

- death, damages recoverable under Employers' Liability Act, elements, loss of care, training of minors, 1089.
- prohibition of employment of minors by state laws, effect in determining negligence, 950.

**Information,**

- rules controlled by Commerce Commission, 660.

**Insane persons,**

- Employers' Liability Act, limitation period not extended by insanity of injured employee, 1141.

**Insolvency,**

- rates, publication and filing, changes prohibited, defenses of estoppel and waiver not available, actions against shippers for under charges, 470.

**Inspection,**

- Boiler Inspection Act, Ch. LIII, 1491-1501.
- orders of Interstate Commerce Commission, 1640-1688.
- rules controlled by Commerce Commission, 660.
- text, 1635-1639.
- compliance with statutes, order of director general of railroads, 1685.
- contributory negligence, damages not reduced, action under Employers' Liability Act, 1048.
- defects, care and diligence in discovering and repairing no defense to action, Safety Appliance Act, 1319.
- duties imposed by Safety Appliance Act not assignable, 1325.
- duties not to be evaded by contract, 1323.
- interstate commerce, state and national control, general principles determining, 47.

**Inspectors,**

- interstate employes, Employers' Liability Act, preparing trains for interstate movement, 860.
- repairing tracks, sectionmen and track laborers, 821.

**Inspectors—Continued.**

interstate employes, Employers' Liability Act—continued.

train and switching crews, "making up" and "breaking up" trains in yards, 866.

trainmen not engaged in interstate commerce, 857.

wrecks, removing debris and constructing temporary tracks, 825.  
yard clerks, 903.

**Insurance,**

contracts, prohibition of Employers' Liability Act, statutory provisions, 1131.

validity, 1132.

"dependency," damages recoverable by next of kin, Employers' Liability Act, 1106.

interstate commerce, transportation from one state to another as element, goods transported, 12.

policies of carriers, order of director general of railroads, 1705.

relief fund, acceptance of benefits by employe, actions against joint tort-feasors not barred, Employers' Liability Act, 1134.

**Interpleader,**

hearing before Commerce Commission, method, 677.

petition, approved form, Interstate Commerce Commission, 1587.

**Interstate commerce,**

Adamson Eight-Hour Wage Law, railroads and employes excepted, 1507.

"among" defined, construction of commerce clause, 6.

applicability of Employers' Liability Act, statutory rules, 717.

authority of Congress, regulation of duties of interstate carriers, scope of power, 147.

regulation of interstate and foreign commerce, 3.

belt lines, interstate status, Safety Appliance Act, 1290.

carriers engaged in, cars used in, Safety Appliance Act, Ch. XLI, 1283-1305.

requirements as to interstate character prior to 1903 Amendment, 1286.

cars and vehicles subject to Safety Appliance Act, 1280.

dining car used for interstate train on siding, 1303.

exemption, cars not subject to state laws, 1398.

hauled in interstate trains, 1299.

hauling empty cars over state lines, 1301.

interstate character not necessary since 1903 Amendment, 1287.

intrastate and interstate cars, inclusion by act as amended, 1270.

intrastate cars, relation to interstate commerce, 1274.

cars, hauling empty cars or property as interstate commerce under Employers' Liability Act, 763.

classes of powers of state and national governments, 37.

classification of freight, application of carload rates, goods belonging to several owners, charges to be similar, 410.

controlling considerations, action by Interstate Commerce Commission, 402.



## Interstate commerce—continued.

classification of freight, etc.—continued.

- differential between carload lots and lesser amounts, legality of rates, 407.
- legality of rates, excessive rates prohibited, 409.
- differential between raw material and manufactured products, no discrimination, 405.
- discrimination effected, duty of Interstate Commerce Commission, 401.
- necessity, discrimination, 399.
- preferences, distinction between property, competition, 403.
- uniform classification, effect of Interstate Commerce Act, 400.
- Commerce Clause of Federal Constitution, Ch. I, 3-34.
- continuous carriage, elements of interstate transportation, origin and destination of shipments, continuous carriage, 263, 265.
- definition, Accident Reports Act, 1504.
- Federal Constitution, 8.
- text, 1672.
- elements,
  - absence of definite destination, immateriality, 269.
  - all stages of shipment, regulation of terminal charges, services and facilities, 283.
  - change of destination in transit, 270.
  - destination in state of origin of shipment, 267.
  - Employers' Liability Act, 766.
  - grain elevation service, regulation under federal control, 286.
  - loading, dunnage, and special preparation of freight cars for shipment, duties of shippers, 287.
  - origin and destination of shipments, continuous carriage, 263, 265.
  - receipt and delivery of goods, inclusion in transportation, 272.
  - Safety Appliance Act, 1284.
  - sales, coal, delivery F. O. B. at mine for transportation to purchaser outside of state, 279.
  - shipment from one foreign country to another foreign country, passage through United States not subject to Interstate Commerce Act, 282.
  - shipment from one state to port in same state, transshipment for exporting, 281.
  - temporary stopping or interruption of shipments, change into intrastate commerce, 273.
  - interstate character not changed, 276.
  - transit privileges, control of Interstate Commerce Commission, 285.
  - transportation from one state to another as essential element, 10.
- employees engaged in interstate commerce, Employers' Liability Act, abandonment of work, effect, 795.
- act may constitute interstate employment in one relation and not in another, 778.

**Interstate commerce—continued.**

employees engaged in interstate commerce, etc.—continued.

application of decisions construing Safety Appliance Act, 800.  
bridge workers, 814.

burden of proof upon defendant, 808.

burden of proof upon plaintiff, 807.

construction and repair work, Ch. XXIV, 809-852.

construction work, future use in interstate commerce, 810.

repair of railroads, distinction, 813.

drainage, excavating ditches, 834.

effect of employment in both intrastate and interstate commerce.  
783.

employment not limited to actual transportation to another state,  
778.

erection of foundation for new bridge under old bridge used for  
interstate commerce, 818.

erroneous decisions holding employment to be interstate, 806.

erroneous decisions holding employment to be intrastate, 803.

general principles, Ch. XXIII, 774-808.

going to and from work, employment in intrastate and interstate  
commerce, 790.

employees on premises, 784.

iron worker carrying material to repair bridge, 815, 818.

limitation of Federal Act to interstate employees, 774.

linemen repairing telegraphs and telephones, 851.

miscellaneous employees, 894-910.

painters, 849.

presumption, 781.

prior or subsequent employment immaterial, 782.

question of employment as question of fact, 798.

rails, handling by employees, 826.

removing old rails and storing new ones, 828.

removing bolts from timbers taken from interstate bridges, 819.

repair and machine shops, roundhouses and other buildings, 836,  
840.

repair of buildings, depots and roundhouses, employment not in-  
terstate, 835.

repair of cars and engines, 841.

temporary delay, 842.

repair of cars and engines used only in interstate commerce, 849.

repair of cars, shopmen in terminal yards, 843, 845, 847.

employment not interstate, 847.

repair of engines in roundhouses, 843, 845, 847.

employment not interstate, 847.

repair of tracks, handling ballast, gravel, etc., 833.

sectionmen and track laborers, 821.

side tracks, spurs and switches, 823.

repairing turntables, 824.

**Interstate commerce—continued.**

employees engaged in interstate commerce, etc.—continued.

- survey of track to improve road, 826.
- switching crews, cars loaded with lumber for repair and construction work, 890.
  - repair of loaded cars, 885.
- temporary cessation of work, 795.
- termination of interstate status by delivery of cars at destination, 887.
- termination of work, sleeping in cars, 792.
- tests adopted by United States Supreme court, 779.
- ties, laborers handling, 831.
- train and switching crews, Ch. XXV, 853-893.
- transportation of employee's own property not subject to Federal Act, 796.
- wrecks, removing débris and constructing temporary tracks, 825.
- employees of interstate carriers, federal and state control, hours of service, 1432.
  - evidence held sufficient to show, Employers' Liability Act, 1223.
  - evidence held not sufficient to show, 1224.
- evidence of employment in interstate commerce as evidence of railroad engaging in interstate commerce, Employers' Liability Act, 772.
- evidence of interstate shipments, orders of Interstate Commerce Commission, Employers' Liability Act, 1220.
- explosives, federal control, 298.
  - text of federal statute, 1676.
- federal control, railroads wholly within state, character of transportation, interstate shipments, 207.
  - common arrangement for transportation with other carriers, immunity, 206.
- federal statutes, see titles such as ACCIDENTS; BOILER INSPECTION ACT; SAFETY APPLIANCE ACT, etc.
- Hours of Service Act, carriers and employees subject to, 1434.
- illegitimate subjects of trade and commerce, prohibition of importation or exportation by states, 25.
- immunity from state legislation, commencement and termination of protection of commerce clause, original packages, 20.
  - imports from foreign states, 16.
- industrial railroads engaged in, Safety Appliance Act, 1298.
- interurban electric railroads engaged in, Safety Appliance Act, 1296.
- intoxicating liquors, regulation of shipment by states, federal statutory exceptions establishing power, 30.
- judicial construction of commerce clause, early decision, 5.
- master and servant, power of Congress to regulate, scope, nature and extent of power, 689.
- method of proving engagement in, railroad employees. Employers' Liability Act, 1223.

**Interstate commerce—continued.**

method of proving engagement in, etc.—continued.

train and switching crews, 1221.

municipal ordinances, regulation of carriers, passenger rates, invalidity, 67.

regulations of traffic, interstate commerce, invalidity of restrictions of commerce, 107.

negligence, intrastate employes not entitled to benefit of statute, Employers' Liability Act, 975.

orders of director general of railroads, federal control act, 1678-1783.  
"original package" defined, protection of Interstate Commerce Clause, 24.

passenger rates, see **RATES AND CHARGES**.

petition, Employers' Liability Act, allegation as to engagement in interstate commerce held sufficient, 1197.

allegations held not sufficient, 1199.

cause of action under Employers' Liability Act, no recovery under state statutes, 1183.

cause of action under state or common law, application of Employers' Liability Act may be raised by answer, 1203.

reference to Employers' Liability Act not required, facts showing liability, 1195.

pleading use of car in interstate commerce, Safety Appliance Act, 1421.

point of shipments, reshipments from delivery, interstate character of shipment not changed, Employers' Liability Act, 770.

preparation, switching cars in yards, application of Safety Appliance Act, 1300.

purpose, scope, validity and construction of Safety Appliance Act, Ch. XL, 1264-1282.

railroads in one state transporting freight, continuous shipment without traffic agreement with other carriers, Safety Appliance Act, 1293, 1294.

re-billing not controlling in determining character of shipment, Safety Appliance Act, 1301.

regulations of Congress, common law of state courts superseded, 58.

intrastate subject matters, valid regulations, 54.

state laws on same subject superseded, 55.

subject matter covered, difficulty of defining, 57.

validity, necessity of connection with interstate commerce, 50.

Safety Appliance Act, see **SAFETY APPLIANCE ACT**.

shipments, interstate character, beginning and ending, Employers' Liability Act, 760.

reshipments from point of delivery, change of interstate character, 767.

state and federal control, general principles governing control, 37, 41.  
respective powers over common carriers, Ch. II, 35-107.

**Interstate commerce—continued.**

- state control, appliances on interstate trains, regulation of heating and operation, validity of state laws, 97.
- delivery of cars for interstate shipment, state regulations superseded by Hepburn Act, 75.
- employees engaged in interstate commerce, power of state to regulate, absence of federal legislation, 98.
- employees managing trains, validity of state laws requiring full crews, absence of federal legislation, 92.
- express companies, regulation by states or municipalities invalid, interstate commerce, 106.
- extent of power over intrastate commerce, similarity to power of Congress over interstate commerce, 68.
- invalidity of federal laws and regulations encroaching upon state's power, 48.
- loss and damage to property carried, state laws superseded by Carmack Amendment to Interstate Commerce Act, 79.
- operation of trains between intrastate points, limitations and exceptions to power of state, 82.
- payment for transportation by advertising, invalidity of state statute, 81.
- rates for intrastate transportation, power to fix, 71.
- rates for transportation by water, power of state to establish, absence of federal legislation, 94.
- rates of carriers, regulations by states in absence of federal laws held invalid, 64.
  - regulations by states upheld, 61.
- rates specified in bill of lading, state statutes superseded by rates under Interstate Commerce Act, 78.
- safety appliances, invalidity as to cars of interstate railroads, 1278.
- speed of trains, invalidity of statute as to speed of trains as burdening interstate commerce, 88.
- switch connections with private side tracks, power of state to compel, intrastate business, 77.
- telegraph messages, invalidity since Amendment of 1910 to Interstate Commerce Act, 102.
  - power of state prior to Amendment of 1910 to Interstate Commerce Act, 100.
  - state laws superseded by federal control under Interstate Commerce Act, 248.
  - "ticker service," not subject to regulation by state, 104.
- track connections for interchange of traffic, power of state to compel making and maintenance, 90.
- stock yard companies, interstate status, Safety Appliance Act, 1290.
- telegraph messages as interstate commerce, 104, 245.
- terminal railroads, interstate status, Safety Appliance Act, 1290.
- transferring cars to industrial track, Safety Appliance Act, 1305.

**Interstate commerce—continued.**

transportation defined, loading, dunnage, and special preparation of freight cars for shipment, duties of shippers, 287.

transportation for express companies, Safety Appliance Act, 1304.

transportation of company property over state lines, Safety Appliance Act, 1304.

transportation, passing through another state to point in same state, Safety Appliance Act, 1298.

"use" of cars and "haul," distinction eliminated by 1903 Amendment, Safety Appliance Act, 1304.

**War,**

federal control of carriers during war with Germany, 114.

effect of statute upon other federal and state laws, 127.

purpose of enactment, 115.

rates for transportation, authority of President to fix, 128.

termination of federal control under statute, 133.

power of Congress over carriers during time of war and time of peace, distinction, 108.

President's assumption of control of railroads, proclamation of 1916, 109.

President's power to control transportation systems in time of war, 109.

**Interstate Commerce Act,****amendments,**

Amendments of 1889-1891, 159.

baggage of passengers, regulations and rules, control of Commerce Commission, 290.

Carmack Amendment, Ch. XV, 528-554.

action against connecting carrier barred by recovery against initial carrier, 553.

action in domicile of terminal carrier prohibited, 550.

connecting and terminal carrier's liability, 598.

enforcement by state courts, 548.

express companies subject to act, 257.

federal decisions, controlling effect in construing statute, 547.

law prior to Carmack Amendment, 536.

liability of carriers, basis, nature and extent, Ch. XVII, 571-608.

liability of initial carrier for loss and damage by connecting carrier, 168; Ch. XV, 528-554.

modification, First and Second Cummins Amendments, Ch. XVI, 555-570.

money paid to shipper by initial carrier, binding effect on other carriers in absence of fraud, 552.

presumption of negligence against initial carriers, 601.

purpose of enactment, 538.

quantum of proof, necessity to establish liability, 594.

removal of actions in state courts, 549.

state laws superseded, 541.

## Interstate Commerce Act—Continued.

## amendments—continued.

- stipulations exempting from liability, invalidity, 540.
- validity, 531.
- chronological review, Ch. V, 158-199.
- commodities essential to national defense, President authorized to direct movement during war, 198.
- common law rules imposed by amendments, 572.
- Cummins Amendments, Ch. XVI, 555-570.
  - carriers affected, 563.
  - interurban railroads, 565.
  - causes leading to enactment, agreed valuation clause in bill of lading, notice of loss, 558.
  - damage for delay, 587.
  - effect of Second Cummins Amendment, 560.
  - export and import shipments to and from foreign countries not adjacent to United States, 570.
  - full damage to live stock, 565.
  - limitation of liability, notice of claims, 568.
  - validity as to property other than live stock, 567.
  - no retroactive effect, 563.
  - object and purpose of enacting Second Cummins Amendment, 561.
  - reservation of remedies, effect of statute, 579.
  - text, 555.
- damages for violation of act, Amendment of 1889, authority to award damages conferred on commission, 487.
- discrimination, definition by act, applicability to subsequent amendments, 312.
  - route of through shipments, right to route beyond carrier's terminal, 337.
- Elkins Act, discrimination, cash payment demanded of some shippers, credit extended to others, 369.
- express companies subject to act, 257.
- prohibition of rebates and discrimination, 164.
- relation of discrimination clause of act to Elkins Act of 1903, 314.
- text, 1553-1556.
- free transportation of destitute persons, etc., Amendment of 1889, 161.
- Hepburn Act, accounts, records and memoranda of interstate carriers under jurisdiction of commission, 185.
- allowances to shippers for services rendered in connection with transportation, 180.
- carriers prohibited from having interest in freight transported, Commodity Clause, 175.
- discrimination, interchange of traffic, use of terminal facilities, denial of use to certain carriers, 334.

## Interstate Commerce Act—Continued.

## amendments—continued.

- express companies subject to act, 255.
- extension of scope of act and powers of Commission, 166.
- interstate commerce determined by character of shipment, 207
- private car lines, subjection to act, 240.
- prohibition of free passes, persons excepted, 181.
- rates, publicity of rates and adherence to published rates, 433.
- refrigeration and ventilation of cars by carriers, duties, 291.
- sleeping car companies, subjection to act, 258.
- switch connection with private side tracks and lateral branch lines, power of Commission to order, 171.
- wharves and connecting tracks, federal control under act, 295.
- loss and damage by shippers, fraudulent claims penalized, 189.
- mandamus rendered available to shippers, Amendment of 1889, 159.
- Mann-Elkins Act of 1910, extension of powers of Commission, additional remedies, 187.
- rates, long and short haul provision, 191.
- routing of interstate freight as directed by shippers, duty of carriers, 193.
- obstruction of interstate commerce during war, Amendment of 1917, 197.
- Panama Canal Act, competing water lines, control or ownership of carrier by rail, prohibition, 223, 224.
- extension of federal jurisdiction over water carriers, 218, 220.
- pipe line companies, transportation of oil and other commodities, subjection to act, 241.
- prohibition from giving information as to business of interstate shippers, 194.
- rates, authority of Commission to prescribe through routes and joint rates, 176.
- suspension of proposed change by Commission, power, 290.
- telegraph, telephone, telephone and cable companies as common carriers, subjection to act, 246.
- valuation of property of interstate carriers, duty of Commission under Act of 1913, 195.
- water carriers, extension of jurisdiction of Commission, by Panama Canal Act of 1912, 195.
- carriers,
  - all carriers in Alaska, District of Columbia and territories subject to act, 205.
  - bridge companies subject to act, 226.
  - common arrangement by ferry company with carrier by rail, subjection to act, 214.
  - common arrangement of carrier by water with carrier by rail, subjection to act, 211.
  - common carriers subject to act, Ch. VI, 200-261.
  - statutory provision, 201.



## Interstate Commerce Act—Continued.

## carriers—continued.

- corporations incorporated in foreign countries, subjection to act, 260.
- definition of term, 202.
- distinguished from industrial railways, plant facilities, 203.
- federal control, scope, historical review, effect of act, 137.
- federal jurisdiction over water carriers, extension by Panama Canal Act, 218, 220.
- individuals and partnerships, subjection to act, 260.
- logging roads, subjection to act, 238.
- pipe line companies, transportation of companies' own commodity, subjection to act, 241.
- transportation of oil and other commodities, 241.
- private car lines, subjection to act, 240.
- receivers of railroads, purchasers of property, subjection to act, 259.
- state control, speed of trains, signals, stopping of trains, absence of legislation by Congress, 86.
- stock yards company, transfer of live stock between pens and tracks of trunk lines, subjection to act, 236.
- telegraph, telephone and cable companies, subjection to act, 245.
- transportation from United States to adjacent foreign countries, carriers subject to Act, 210.
- causes of enactment, common law inadequate to curb evils of railroad operation, 141.
- decision limiting state's powers to intrastate commerce, 146.
- futility of state regulation of charges and rates, 145.
- inadequacy of common law remedies, 141.
- original act, 139.
- regulation of rates, futile attempts of states to regulate, 145.
- "common control, management or arrangement for a continuous carriage or shipment," definition and explanation of term, 216.
- compensation, money only may be received for transportation by carriers, 479.
- promissory notes to pay freight charges, illegality, 480.
- construction and interpretation, 155.
- damages for violation of act, actions for overcharges exceeding scheduled rates, prosecution in courts without determination of Commission, 494.
- assignment of claims for damages, 526.
- attorney's fees, services before Commission, allowance not permitted, 526.
- authority of courts and Commission, 485.
- authority to award damages conferred on Commission, Amendment of 1889, 487.

**Interstate Commerce Act—Continued.**

damages for violation of act, etc.—continued.

- award by Commission, maximum rate need not be prescribed by Commission, 519.
- extension only to violations of act, 490.
- discrimination, award of damages by Commission for unlawful discrimination, 488.
- necessity of order of Commission to recover damages in courts, 500.
- excessive rates, courts without primary jurisdiction to award damages, 492.
- findings of fact by Commission required, award of damages against carriers, 516, 517.
- inadequate service or facilities, award by Commission, 513.
- jurisdiction of courts and Commission, Ch. XIV, 484-527.
- jurisdiction of state courts not wholly superseded, 501.
- limitations, complaints for damages, filing with Commission within two years, 523.
- measure of damages, unreasonable rates and unlawful discrimination, 503.
- misrouting shipments, award by Commission, 513.
- orders of Commission awarding damages, enforcement in state and federal courts, 522.
- parties entitled to damages, excessive freight charges, consignors and consignees, 506.
- pecuniary loss must be shown, 502.
- remedy before Commission, establishment, conflicting provisions of statute harmonized, 491.
- state courts, actions for damages under section eight of act not prosecuted in state courts, 498.
- statutory provision creating liability, 485.
- discrimination, see title DISCRIMINATION.
- electric interurban railroads, subjection to act, 233.
- enforcement by Commission, Amendment of 1889, 161.
- evidence, production of books and papers, power of Commission, Amendment of 1891, 161.
- free transportation of destitute persons, reduced rates for transportation of poor persons, disabled soldiers, etc., Amendment of 1889, 161.
- fundamental requirements of act as originally enacted, 152.
- individuals and partnerships, subjection to act, 260.
- interstate transportation, act not applicable to all interstate commerce, 300.
- transportation wholly in one state not subject to act, 285.
- "or otherwise," definition, Panama Canal Act, extension of federal jurisdiction over water carriers, 220.
- original enactment, fundamental requirements, 152.
- history, purpose, scope and validity, Ch. IV, 137-157.
- rates, Commission not authorized to prescribe rates, 156.

## Interstate Commerce Act—Continued.

- penalties for violation of act, Amendment of 1889, 160.
- preliminary steps toward enactment, Cullom Committee, 149.
  - report of Cullom Committee and recommendation of bill, 150.
- purpose of original act, reasonableness of rates, prevention of discrimination, 154.
- "railroad" defined, 300.
  - applicability to subsequent amendments, 312.
- rates, cities and localities entitled to benefit of natural advantages, 378.
- damages,
  - actions for damages under section eight of act not prosecuted in state courts, 498.
  - actions for overcharges exceeding scheduled rates, prosecution in courts without determination of Commission, 494.
  - arbitrary sum added to sale price to cover excessive charges, right of shipper to reparation, 507, 508.
  - excessive rates, courts without primary jurisdiction to award damages, 492.
  - findings of fact by Commission required, award of damages against carriers, 516.
    - all persons benefited, 515.
  - limitations, complaints for damages, filing with Commission within two years, 523.
  - measure of damages, unreasonable rates and unlawful discrimination, 503.
  - misrouting shipments, award by Commission, 513.
  - parties entitled to damages, excessive freight charges, consignors and consignees, 506.
  - past shipments with excessive rates, damages not automatically awarded, 509.
  - rates, award by Commission, bar to action for additional damages, overcharges, 513.
    - maximum rate need not be prescribed by Commission, 519.
  - different uses of commodities, different rates not justified, 413.
- differentials between Atlantic coast cities, competitors, relations between carriers, 390.
- equality between communities under similar conditions required, 374.
- joint rates between two localities similarly situated, prohibition by act, 389.
- localities entitled to non-discriminatory rates, 375.
- publication and filing, act mandatory, 437.
- publicity and adherence to published rates, 433.
- purpose of Congress in enactment of act, 435.
- refrigeration and ventilation of cars, duty of carriers, 291.
- "regulation" of interstate and foreign commerce, definition, 14.
- regulations concerning baggage to be published, 444.

**Interstate Commerce Act—Continued.**

- shipments and transportation services controlled by act, Ch. VII, 262-301.
- street railroads crossing state line, subject to act, 230.
- switching service at ports, imported goods, subject to act, 297.
- terminal and belt railroads, subjection to act, 234.
- text of act, 1513-1552.
- "transit privileges," unlawful discrimination by carriers, definition, 353.
- "transportation" defined, 300.
- applicability to subsequent amendments, 312.
- private car lines as being subject to act, 240.
- weighing of shipments of freight, federal control under act, 290.
- wharves and connecting tracks, federal control under act, 295.

**Interstate Commerce Commission,**

see INTERSTATE COMMERCE ACT.

- accident reports, text of federal statute, 1672.
- accounts, records and memoranda of carriers, control, 656.
- amendments to pleading, power of Commission, 677.
- answers, rules, 676.
- applications of carriers, relief by Commission, 675.
- Ash Pan Act, duties of Commission, 1502.
- attorneys, employment to aid Commission, 686.
- baggage of passengers, regulations and rules, control of Commission, 290.
- Boiler Inspection Act, districts, creation, fifty inspection districts, 1493.
  - extension of statute, Amendment of 1915, 1499.
  - rules and regulations, adoption and enforcement, 1495.
  - text 1635-1639.
- brakes, order of Commission increasing percentage of cars to be equipped with air brakes, 1258.
- carload freight, Commission may not compel receipt and switching to industries on carrier's terminals, 649.
- cars,
  - duty to furnish, obligation as raising judicial question, Commission's powers administrative in character, 637.
  - no authority to compel furnishing of special kinds of cars, 635.
  - rules of carriers governing distribution and exchange, power of Commission, 642.
- claims for reparation, basis on findings of Commission, 674.
- competing water lines, control or ownership of carrier by rail, prohibition, approval of Commission, 223, 224.
- complaints to Commerce Commission, absence of direct damage not ground for dismissal, 666.
  - filing, essentials when reparation is sought, 672.
  - rules governing, 671.
  - who may make, 664.

## Interstate Commerce Commission—Continued.

- connection between railroads and water carriers, establishment by Commission, 658.
- creation, statutory provisions, 626.
  - text of Interstate Commerce Act, 1526.
- depositions, power of Commission to order, 162, 677.
- discrimination, railroad discriminating against steamship lines, power of Commission, 657.
- drawbars, height, decisions as to requirements of law, 1378.
  - delegation of authority as to height, validity, 1280.
  - instructions erroneous under old and new orders of Commission, 1379.
  - instructions erroneous under old order, correctness under new order, 1379.
  - necessity, application of Safety Appliance Act to locomotives, 1380.
  - order of Commission, 1376.
    - new and old orders, 1377.
    - new order, 1261.
    - original order prescribing height, 1257.
- evidence of interstate shipments, orders of Commission, Employers' Liability Act, 1220.
- explosives, regulations for transportation, Commission may formulate, 655.
  - text of federal statute, 1676.
- extension of power of Commission by Hepburn Act, 166.
- headlights, state laws superseded by Boiler Inspection Act as amended, 1500.
- hearing before Commission, briefs, rules governing filing, 681.
  - continuances, 679.
  - method, 677.
  - place of holding, 678.
  - production of papers, Commission may compel, 679.
  - stipulations, 679.
  - witnesses, Commission may compel attendance and testimony, 679.
- Hours of Service Act, evasion of statute, different service after statutory period, 1446.
  - operators, limitation upon hours of service, tower men and switch tenders, 1462.
  - violation of statute, duty of Commission, 1444.
- inspection of locomotive boilers, rules controlled by Commission, 660.
- investigation by Commission, Accident Reports Acts, 1505.
  - reports not to be used in damage suits, 1505.
  - reports, power of Commission, 663.
- investigation of wages, general order of director general of railroads, 1682.
- judicial notice, orders of Commission, action under Safety Appliance Act, 1422.
- jurisdiction, text of Interstate Commerce Act, 1518, 1522, 1526.

## Interstate Commerce Commission—Continued.

- limitation of liability, contract against carrier's own negligence, invalidity, stipulation filed with Commission, 578.
- members, authority to divide members into divisions, 631.
  - divisions established, 632.
  - increase, amendments to statute, 627.
- nature, powers and duties, Ch. XIX, 624-663.
  - administrative body exercising quasi judicial functions, 628.
- necessity of national Commission, enforcement of federal regulations, 625.
- orders, boiler inspection, 1640-1688.
  - compliance with, order of director general of railroads, 1685.
  - drawbars, height, 1382.
  - enforcement, service, duties of carriers, 683.
  - Safety Appliance Act, 1598-1632.
- pleadings, rules governing, 674.
- powers and duties, Ch. XIX, 624-663.
  - cars, duty to furnish, obligation as raising judicial question, 637.
    - no authority to compel furnishing of special kinds of cars, 635.
  - general statement, 630.
  - limitation, necessity of delegation of power, 634.
  - power to proceed when Commerce Commission acts on its own motion, 668.
- practice rules, 1575-1589.
- procedure before Commission, Ch. XX, 664-686.
- process, method of serving papers, 676.
- rates and charges, power of Commission to prescribe, 638.
  - basing point system, legality, 380.
  - charges by shippers for services rendered, 653.
  - form of schedule, Commission may prescribe, 653.
  - group rates, establishment and maintenance, 387.
  - maximum rates to and from ports, establishment, 659.
  - prohibition of filing increases without approval of Commission, 642.
- publication and filing, changes prohibited, thirty days' notice to Commission, 448.
  - courts bound by published rates until set aside by Commission, 462.
  - demurrage charges to be filed with Commission, 448.
  - essentials of schedules filed with Commission, 441.
- reduced rates for longer than for shorter distance, Commission may authorize, 651.
- reduction to meet water competition, increase subject to approval of Commission, 658.
- suspension of advance by Commission, investigation, 639.
- suspension of tariff schedules, form of application, 675.
- through routes and joint rates, establishment, 646.
  - rail and water lines, 648.

**Interstate Commerce Commission—Continued.**

rates and charges, etc.—continued.

statute compelling establishment by carriers, validity, 644.

transportation to foreign countries, 649.

Twenty-Eight-Hour Live Stock Law, 659.

records, interstate commerce, method of proving engagement in, Employers' Liability Act, 1221.

rehearing before Commission, procedure, 684.

reports, annual reports by carriers, Commission may require, 661.

annual report by Chief Inspector to Commission, Boiler Inspection Act, 1499.

annual reports by Commission required, 660.

monthly reports by carriers to Commission required, 661.

monthly reports showing violation of Hours of Service Act, 1440.

publication of reports, employment of assistants, Amendment of 1889, 161.

Boiler Inspection Act, 1498.

rules of procedure, power of Commerce Commission to formulate, 671.

Safety Appliance Act as amended, 1593-1597.

Amendments of 1903, summary, 1259.

authority to standardize appliances, 1260.

necessity for safety appliances not affected by order, 1373.

power of Commission, 662.

purpose of Congress in authorizing Commission to prescribe standard equipment, 1375.

standardization order, 1262.

salaries of Commissioners, amendments to statute, 627.

schedules, contracts and annual reports, filing with Commission,

public records as prima facie evidence, 680.

switch connections, power of Commission to order, 655.

text of Interstate Commerce Act, and amendments, 1513-1552.

tickets, control of Commission over mileage, excursion and commutation passenger tickets, 421.

track storage and demurrage charges, control of Commission, 294.

transcripts of testimony before Commission, furnishing two parties, 681.

water lines, Commission may authorize railroads to continue ownership, 652.

witnesses, power of Commission to summon, Amendment of 1891, 161.

invalid provision of statute remedied by enactment of Compulsory Testimony Act, 162.

**Interurban railroads.**

Adamson Eight-Hour Wage Law, railroads and employes excepted, 1507.

**Interurban railroads—Continued.**

- Employers' Liability Act, application to interurban electric railroads, 752.
- Interstate Commerce Act, subjection to, engaging in interstate commerce, 233.
- loss and damage, initial carrier's liability, carriers affected by Cummins Amendment, 565.
- Safety Appliance Act,
  - air brakes, necessity, 1332.
  - recovery for injury caused by collisions, failure of brakes to work, 1333.
  - exceptions, cars on interurban railroads moving over street railroads, no exemption, 1397.
  - strict construction of exceptions, 1396.
  - interstate commerce, interurban railroads engaged in, 1296.

**Intoxicating liquors,**

- prohibition, order of director general of railroads, 1777.
- regulation of shipment by states, federal statutory exceptions establishing power, 30.

**Intrastate commerce,**

see INTERSTATE COMMERCE.

- cars, hauling empty cars or property, Employers' Liability Act, 763.
- intrastate cars, inclusion by Safety Appliance Act, as amended, 1270, 1287.
  - relation to interstate commerce, Safety Appliance Act, 1274.
  - validity of amendment including, Safety Appliance Act, 1273.
- intrastate cars used on tracks other than main lines, Safety Appliance Act, 1277.
- Employers' Liability Act, scope, 702.
  - employment in both intrastate and interstate commerce, effect, Employers' Liability Act, 783.
  - erroneous decisions holding employment to be intrastate, 803.
  - interstate character of shipments, beginning and ending, 760.
    - destination in same state, passage through another state, 766.
  - reshipments from point of delivery, change of interstate character of shipment, 767.
    - interstate character of shipment not changed, 770.
  - intrastate employes not entitled to benefit of statute, 975.
  - negligence, acts of employes and defects of equipment used in intrastate commerce as cause of injury, 973.
- illegitimate subjects of trade and commerce, prohibition of importation or exportation by states, 25.
- immunity from state legislation, commencement and termination of protection of commerce clause, original packages, 20.
- railroads, application of Employers' Liability Act, railroad wholly within single state, 742.



**Intrastate commerce—Continued.**

- rates, increase, order of director general of railroads, 1735-1748.
- regulation of terminal charges, services and facilities, 283.
- regulations of Congress, common law of state courts superseded, 58.
- state laws on same subject superseded, 55.
- subject matter covered, difficulty of defining, 57.
- validity, necessity of connection with interstate commerce, 50.
- state control, delivery of cars for interstate shipment, state regulations superseded by Hepburn Act, 75.
- extent of power over intrastate commerce, similarity to power of Congress over interstate commerce, 68.
- rates for intrastate transportation, power to fix, 71.
- switching crews moving intrastate cars, Employers' Liability Act, 879.
- switching interstate cars into or out of interstate trains, conflicting decisions, Employers' Liability Act, 867.
- federal control under United States decision, 871.
- test in determining interstate employment, 873, 877.
- temporary stopping or interruption of shipments, change into intrastate commerce, 273.
- interstate character not changed, 276.
- transportation wholly in one state not subject to Interstate Commerce Act, 285.
- war, federal control of carriers during war with Germany, actions.
  - right to sue carriers under federal control, 129.
  - effect of statute upon other federal and state laws, 127.
- Federal statute, 114.
  - President's assumption of control, proclamation of 1916, 109.
  - purpose of enactment, 115.
  - rates for transportation, authority of President to fix, 128.
  - termination of federal control, 133.
- power of Congress over carriers during time of war and time of peace, distinction, 108.
- President's power to control transportation systems in time of war, 109.

**Inventory,**

- order of director general of railroads, 1687.

**Iron,**

- rates, discrimination, differentials between Atlantic coast cities, 390.
- increase, order of director general of railroads, 1739, 1745.

**Iron worker,**

- carrying material to repair bridge, employe engaged in interstate commerce, Employers' Liability Act, 815, 818.

## J.

**Janitor,**

engagement in interstate commerce, Employers' Liability Act, 836, 840.

**"Jim Crow" cars,**

discrimination, colored passengers, separation from white persons not unlawful, 420.

**Judgments,**

appeal, penalty added on affirmance, action under Employers' Liability Act, 1247.

death, damages recoverable under Employers' Liability Act, distribution, settlement by payment of lump sum, 1083.

discrimination, prohibition of Interstate Commerce Act, judgments by consent and waiver of defenses prohibited, 319.

judgment notwithstanding verdict, power of state courts to direct, action under Employers' Liability Act, 1246.

war, federal control of carriers during war with Germany, right to sue carriers under federal control, 129.

**Judicial notice,**

employees engaged in interstate commerce, Employers' Liability Act, 781.

interstate commerce, Employers' Liability Act, 1223, 1224.

limitations, pleading, amendments allowed after two-year period, Employers' Liability Act, 1215.

orders of Interstate Commerce Commission, action under Safety Appliance Act, 1422.

petition under Employers' Liability Act, necessity of showing injury or death under conditions described in statute, 1179.

reference to Liability Act not required, facts showing liability, 1195.

**Jurisdiction,**

appeals, Employers' Liability Act,

federal question, binding effect of ruling of state courts, 1162.

petition not stating good cause of action under Federal Act, 1166.

review, extent of power, incidental and non-federal questions not reviewable, 1161.

review of judgment of state courts by United States Supreme court, 1153.

writ of error, essentials of record, denial of right under Federal laws, 1159.

evidence insufficient to show liability, 1160.

exclusion of remedy in certain cases, 1156.

beneficiaries, existence as jurisdictional, Employers' Liability Act, 1056.

**Jurisdiction—Continued.**

- damages for violation of Interstate Commerce Act, jurisdiction of courts and Commission, Ch. XIV, 484, 527.
- jurisdiction of state courts not wholly superseded, 501.
- Employers' Liability Act, defects, Amendments of 1910, 713.
- jurisdiction of state and federal courts, Ch. XXXIV, 1145-1169.
- purpose of Amendment of 1910, 715.
- Interstate Commerce Act, competition, text of statute, 1518.
- removal of causes, see REMOVAL OF CAUSES.
- Safety Appliance Act, actions for personal injuries, enforcement in state courts, 1416.
- requirement as to interstate character prior to 1903 Amendment, 1286.
- venue, action may be brought in federal courts, Employers' Liability Act, 1145.
- actions may be brought in state courts, 1146.

**Jury,**

- questions of fact, see TRIAL.
- trial by jury, damages for violation of Interstate Commerce Act, authority to award damages conferred on Commission, 487.
- findings of fact by Commission required, 517.
- verdicts, state laws permitting verdict by less than twelve jurors, validity in actions under Employers' Liability Act, 1236.

**K.****“Kicking” cars,**

- automatic couplers, violation of Safety Appliance Act, illustrations, 1341.

**L.****Laborer injured or killed,**

- assumption of risk, Employers' Liability Act, employees held not to have assumed risk, 1026.
- employees held to have assumed risk, 1021.
- death, damages recoverable under Employers' Liability Act, contributions by deceased, necessity of showing, 1101.
- employment in interstate commerce, Employers' Liability Act, 821, 909.
- repair of tracks, handling ballast, gravel, etc., 833.
- repairing side tracks, spurs and switches, 823.
- ties, laborers handling ties, 831.
- negligence, acts of employees and defects of equipment used in interstate commerce as cause of injury, Employers' Liability Act, 973.
- evidence held to show actionable negligence, 962, 967, 969.
- injury caused by servant acting within scope of employment, necessity, 936.

**Ladders,**

- extent of requirement of Safety Appliance Act, 1372.
- grab irons, use for other purposes than coupling, protection of Safety Appliance Act, 1366.
- Interstate Commerce Commission, purpose of Congress in authorizing Commission to prescribe standard equipment, 1375.
- order of Commission, 1601.
- knowledge of defect not required, 1371.
- necessity, 1365.

**Landlord and tenant,**

- application of Employers' Liability Act to lessor of railroad, 750.
- lessor of railroad as party defendant, 1177.

**Licenses,**

- cars, hauling cars with defective appliances over other railroads, penalty, 1282.
- parties defendant, Employers' Liability Act, 1177.
- regulations,
  - common arrangement by ferry company with carrier by rail, subjection to Interstate Commerce Act, 214.
  - employees engaged in interstate commerce, power of state, absence of federal legislation, 98.
  - express companies, regulation by states or municipalities invalid, interstate commerce, 106.
  - immunity from state legislation, commencement and termination of protection of commerce clause, original packages, 22.
  - imports from foreign states, immunity from state legislation, 16.
  - navigation, judicial construction of commerce clause of constitution, early decision, conflict of state and federal law, 5.

**Liens,**

- animals, 28-Hour Live Stock Law, text, 1669.

**Lightning rods,**

- erection, immunity from state legislation, 23.

**Lights,**

- boiler inspection, orders of Interstate Commerce Commission, 1651, 1657.

**Limitation of actions,**

- Employers' Liability Act, Ch. XXXIII, 1137-1144.
  - accrual of cause of action, death cases, 1142.
  - conditions precedent to recovery, 1137.
  - estoppel or fraud may not avoid limitation period, 1140.
  - period not extended by insanity of injured employee, 1141.
  - plea not required when suit is barred, 1138.
  - pleading, amendments allowed after two-year period, 1215.

**Limitation of actions—Continued.****Employers' Liability Act, etc.—continued.**

- amendment setting up new cause of action not allowed, 1210.
- cause of action under state law, recovery under Federal Act, omission supplied by answer, 1186.
- provision of statute, 1137.
- controlling effect, 1422.
- question of limitation, submission to jury as error, 1143.
- text of act, 1591.
- time of commencement of action as question of procedure, 1143.
- Interstate Commerce Act, damages for violation of, complaints for damages, filing with Commission within two years, 523.
- Safety Appliance Act,
  - amendments stating new cause of action, prohibition, 1423.
  - state statute, effect in absence of interstate employment, 1423.

**Linemen,**

- engagement in interstate commerce, Employers' Liability Act, 909.
- repairing telegraphs and telephones, 851.

**Live stock,**

- see ANIMALS; TWENTY-EIGHT-HOUR LIVE STOCK LAW.

**Lobbying,**

- order of director general of railroads, compensation of agents and attorneys limited, 1682.

**Locomotives,**

- air brakes, "trains" within Safety Appliance Act, what constitutes, 1330.
- Ash Pan Act, Ch. LIV, 1502, 1503.
  - duties of Interstate Commerce Commission, 1502.
  - orders of Interstate Commerce Commission, 1653.
  - receivers as "common carriers," 1503.
  - statute not applicable to electric locomotives, 1503.
  - statute requiring equipment, 1502.
  - text of statute, 1671.
  - violation, penalties, 1502.
- assumption of risk, no defense, violation of Safety Appliance Act, 1400.
- automatic couplers, application of Safety Appliance Act, 1351.
  - necessity of couplers, 1355.
  - engine and tender, coupler not required, 1360.
  - provision of Safety Appliance Act, 1340.
  - trainmen on top of cars protected, 1346.
  - violation of Safety Appliance Act, illustrations, 1341.
- cars and vehicles subject to Appliance Act, 1280.
  - intrastate and interstate cars, 1270.

**Locomotives—Continued.**

cars and vehicles subject to Appliance Act—continued.

requirement as to interstate character, 1287.

contributory negligence, damages not reduced, violation of Federal statutes causing injury, action under Employers' Liability Act, 1048.

drawbars, necessity, application of Safety Appliance Act to locomotives, 1380.

exception from requirements of Safety Appliance Act, statutory provision, 1385.

hours of service, continuity, breaking of, brief periods off duty, 1450.

inspection of boilers, Ch. LIII, 1491-1501.

appeal from decision of inspector, rights of carrier, 1494.

carrier's duties and obligations, 1492.

Chief Inspector, appointment by President, 1492.

district inspectors, duties, enforcement of statute, 1494.

districts, creation, fifty inspection districts created, 1493.

duty created by statute, nature, 1496.

extension of Boiler Inspection Act, Amendment of 1915, 1499.

orders of Interstate Commerce Commission, 1640-1688.

rules and regulations, adoption and enforcement, 1495.

rules controlled by Commerce Commission, 660.

text, Boiler Inspection Act, 1635-1639.

interstate employes, Employers' Liability Act,

coal for engines, dumping into chutes and tenders, 900.

supplying and moving, 897.

painters, 849.

repairs, 847, 849.

engines in roundhouses, 843, 845, 847.

reports of accidents, filing by carriers, Boiler Inspection Act, 1497.

orders of Interstate Commerce Commission, 1648, 1665.

safety appliances, orders of Interstate Commerce Commission, 1623-1629.

substitution for appliances unlawful, Safety Appliance Act, 1312.

watching locomotive as being "on duty," Hours of Service Act, 1458.

**Logs and logging,**

contributory negligence as defense, no air brakes on logging trains, Safety Appliance Act, 1409.

discrimination, joint through rates, divisions to tap lines or logging roads, 349.

Employers' Liability Act, application, tap lines and logging roads, 740.

interstate carriers,

distinction from industrial railways, plant facilities, 203.

logging roads, 238.

interstate commerce,

employes engaged in, transportation of employe's own property not subject to Employers' Liability Act, 796.

**Logs and logging—Continued.**

interstate commerce—continued.

origin and destination of shipments, continuous carriage, illustrations, 265.

receipt and delivery of goods, inclusion in transportation, 272.

reshipments from delivery, interstate character of shipment not changed, Employers' Liability Act, 770.

temporary stopping or interruption of shipments, change into intrastate commerce, 273.

rates, discrimination, different conditions affecting transportation of similar commodities, 415.

lumber and lumber products, discrimination prohibited, 414.

Safety Appliance Act as amended, 1594.

exception from act, statutory provision, 1385.

cars not subject to state laws, 1398.

**Lottery,**

see GAMBLING.

**Lumber,**

automatic couplers, failure of coupler to work under all circumstances as violation of Safety Appliance Act, 1343.

damages for violation of Interstate Commerce Act, filing complaints with Commission within two years, 523.

discrimination in rates, deduction to pay shippers for building tie hoists, 370.

different conditions affecting transportation of similar commodities, 415.

industries on carrier's own lines, preference against competitors on other railroads, 396.

lumber and lumber products, discrimination prohibited, 414.

rebates to pay for land for right of way, 368.

strict uniformity not always required, 318.

transit privileges, Interstate Commerce Act violated, 353.

employees engaged in interstate commerce, switching crews, cars loaded with lumber for repair and construction work, Employers' Liability Act, 890.

interstate commerce, evidence held sufficient to show, Employers' Liability Act, 1223.

origin and destination of shipments, continuous carriage, illustrations, 265.

temporary stopping or interruption of shipments, interstate character not changed, 276.

transit privileges, control of Commerce Commission, 285.

loss and damage, initial carrier's liability, change of destination or re-routing, effect, 604.

rate for transportation, increase, order of director general of railroads, 1739, 1745.

2 Control Carriers—58.

## M.

**Machinery,**

appliances, carrier's duty to exercise ordinary care, Employers' Liability Act, 927.

defects of equipment, negligence under Employers' Liability Act, 912.

**Machinist,**

engagement in interstate commerce, repair and machine shops, roundhouses and other buildings, Employers' Liability Act, 836, 840.

**Mandamus,**

Interstate Commerce Act, Amendment of 1889, mandamus rendered available to shippers, 159.

text of Interstate Commerce Act, 1539, 1545.

**Mann-Elkins Act,**

damages for violation of Interstate Commerce Act, orders of Commission awarding damages, enforcement in state and federal courts, 522.

extension of powers of Commission, additional remedies, 187.

prohibition from giving information as to business of interstate shippers, 194.

routing of interstate freight as directed by shippers, duty of carriers, 193.

**Manufactures,**

classification of freight, differential between raw material and manufactured products, no discrimination, 405.

discrimination, transit privileges, Interstate Commerce Act violated, 353.

interstate commerce, industrial railroads engaged in, Safety Appliance Act, 1298.

transportation from one state to another as element, goods transported, 12.

prohibition from owning or having interest in freight transported, amendment to Interstate Commerce Act, Commodity Clause, 175.

**Master and servant,**

see EMPLOYERS' LIABILITY ACT.

actions under Employers' Liability Act, procedure, controlling effect of state laws, 733.

assumption of risk, Employers' Liability Act, Ch. XXVIII, 978-1027.

application of doctrine, analysis of federal decisions, 996.

confusing with contributory negligence, instructions, 1012.

defense not available, number of causes of injury, 1014.



**Master and servant—Continued.**

assumption of risk, etc.—continued.

violation of Hours of Service Act, 1012.

violation of rules, 1015.

violation of Safety Appliance Act, 1008.

defense to negligence of fellow-servants, 993.

distinction from contributory negligence, 1006.

employees held not to have assumed risk, 1023.

employees held to have assumed risk, 1018.

ordinary, known or obvious risks assumed by employees, 987.

exceptions, promise to repair, 992.

purpose of enactment, uniformity and modification of common law, 706.

assumption of risk under Safety Appliance Act, Ch. XLVIII, 1400-1415.

car couplers, common law rule, carrier's liability, 1252.

distinction from contributory negligence, 1403.

no defense, violation of act, 1400.

provisions of original act, summary, 1255.

two distinct acts of negligence, right to instructions, 1402.

beneficiaries under Employers' Liability Act, Ch. XXX, 1053-1060.

contracts prohibited by Employers' Liability Act, Ch. XXXII, 1131-1136.

contributory negligence, Employers' Liability Act, Ch. XXIX, 1028-1052.

proximate cause, recovery prevented where employee's act is sole cause, 1041.

contributory negligence under Safety Appliance Act, Ch. XLVIII, 1400-1415.

death, see DEATH BY WRONGFUL ACT.

defects in appliances, employee's act causing defect no defense, Safety Appliance Act, 1325.

director general of railroads, general orders, federal control, 1678-1783.

dismissal of employee, insubordination as emergency under Hours of Service Act, 1484.

employees engaged in interstate commerce, Employers' Liability Act, 894-910.

general principles, Ch. XXIII, 774-808.

federal and state control, hours of service, 1432.

power of state to regulate, absence of federal legislation, 98.

employment of laborers in other states as interstate commerce, 12.

fellow-servants, Employers' Liability Act,

abolition of rule as to interstate employees, 736.

negligence of officers, agents or employees, 912.

acts of employees and defects of equipment used in intrastate commerce as cause of injury, 973.

**Master and servant—Continued.**

fellow-servants, Employers' Liability Act—continued.

liability of railroad for acts of officers and employes, statute not limited to acts of fellow-servants at common law, 924.

purpose of enactment, uniformity and modification of common law, 706.

hours of work, see HOURS OF SERVICE.

information relating to interstate shippers, prohibition against giving, 194.

knowledge of defect by employe, suit not barred, Safety Appliance Act, 1402.

negligence, willful wrongs not within Employers' Liability Act, 976.

power of Congress to regulate, scope, nature and extent of power, 689.

proximate cause of injury, recovery prohibited when employe's negligence is sole cause, Safety Appliance Act, 1322.

negligence as proximate cause of injury, necessity, Employers' Liability Act, 944.

regulations of interstate employes,

power of state to regulate, absence of federal legislation, 98.

regulations of Congress, validity, necessity of connection with interstate commerce, 51.

trains, validity of state laws requiring full crews, absence of federal legislation, 92.

relief fund, acceptance of benefits by employe, actions against joint tort-feasors not barred, Employers' Liability Act, 1134.

res ipsa loquitur, applicability of rule to actions under Employers' Liability Act, 951.

safety appliances, see SAFETY APPLIANCE ACT.

scope of employment, injury caused by servant acting within scope of employment, necessity, Employers' Liability Act, 936.

wages, see title WAGES.

**Meals,**

Hours of Service Act, breaking of continuity, brief periods off duty, 1450.

**Meat,**

classification of freight, differential between raw material and manufactured products, no discrimination, 405.

rate for transportation, increase, order of director general of railroads, 1738, 1745.

**Mechanics,**

parties defendant, agents and servants causing injury, non-liability, Employers' Liability Act, 1177.

**Mexico,**

transportation from United States to adjacent foreign countries,  
carriers subject to Interstate Commerce Act, 210.

**Militia,**

federal control of carriers during war with Germany, purpose of  
enactment, 115.

loss and damage, carrier's liabilities at common law, exceptions  
exempting carriers, 574.

President's assumption of control of railroads, proclamation of 1916,  
109.

President's power to control transportation systems in time of war,  
109.

**Mines and mining,**

discrimination, shortage of cars, equal distribution among shippers  
necessary, 344.

prohibition from owning or having interest in freight transported,  
amendment to Interstate Commerce Act, Commodity Clause, 175.

rate for transportation, increase, order of director general of rail-  
roads, 1739, 1745.

**Mississippi,**

presumption of negligence created by state statute, applicability of  
Mississippi statute to actions under Employers' Liability Act,  
948.

**Mistake,**

rates, publication and filing, collection of scheduled rates manda-  
tory, 466.

**Money,**

carrier's compensation, see CARRIERS.

death, damages recoverable under Employers' Liability Act, loss  
of future benefits limited to present cash value, 1075, 1079.

**Monopolies,**

see COMBINATIONS AND MONOPOLIES.

**Motions,**

appeal, federal question, manner of asserting, Employers' Liability  
Act, 1164.

election, action under state law and Employers' Liability Act, motion  
to elect before trial, sustaining, 1231.

motions to elect under Iowa statute, 1229.

no election by widow suing as individual and as administratrix,  
1233.

time of sustaining motion to elect, 1227.

**Motorman injured or killed,**

air brakes, recovery for injury caused by collisions, failure of brakes to work, Safety Appliance Act, 1333.

death, evidence held not to show actionable negligence, Employers' Liability Act, 969.

**Municipal corporations,**

discrimination in rates,

absorbing switching charges at one point and refusing at another, 388.

basing point system, legality, control of Interstate Commerce Commission, 380.

cities and localities entitled to benefit of natural advantages, 378.

difference in amount of traffic between similar localities, discriminatory rates and fares prohibited, 384.

different interstate and intrastate rates between localities, prejudice resulting, 376.

different rates in opposite directions over same lines, no discrimination, 387.

differentials between Atlantic coast cities, competitors, relations between carriers, 390.

differentials between cities on opposite banks of rivers crossed by expensive bridges, reasonableness of rates, 395.

equality between communities under similar conditions required, 374.

higher rates to one point than to another, injustice, 375.

increased rates on branch lines parallel to main line permitted, 392.

localities entitled to non-discriminatory rates, 375.

reasonableness of rates, presumption, illegality if another locality is prejudiced, 379.

rebilling and reshipping grain, denial of privilege to other cities, unlawful discrimination, 393.

transcontinental passenger fare, discrimination as affecting intermediate localities, 428.

unlawful preferences between cities and localities, Ch. X, 373-398.

express companies, regulation invalid, interstate commerce, 106.

licenses, arrangement by ferry company with carrier by rail, subjection to Interstate Commerce Act, 214.

imports from foreign states, immunity from state legislation, protection of commerce clause, 16.

state and national control over interstate carriers and transportation, general principles determining, illustration, 44.

ordinances, passenger rates, invalid regulations, effect of acceptance of conditions in franchise, 67.

regulations of speed of trains, signals, stopping of trains, absence of legislation by Congress, 86.

regulations of traffic, invalidity of restrictions of commerce, 107.

## N.

**Navigable waters,**

discrimination, competition between localities, rate resulting not unreasonable, 382.

through routes and joint rates with water lines, refusal of railroad to establish, 338.

federal control, extension of jurisdiction by Panama Canal Act, 222.

**Navigation,**

see VESSELS.

**Negligence,**

see EMPLOYERS' LIABILITY ACT; MASTER AND SERVANT.

comparative negligence, damages, apportionment under Employers' Liability Act, difference from Georgia statute, 1038.

different theories, adoption of theory by Employers' Liability Act, 1033.

contracts prohibited by Employers' Liability Act, Ch. XXXII, 1131-1136.

contributory negligence, Employers' Liability Act, Ch. XXIX, 1028-1052.

cars, use in interstate traffic, materiality, 1288.

death, compensatory damages, measure, 1073.

measure of damages, instructions held erroneous, 1116.

reduction because of contributory negligence, cure of error by remittitur, 1127.

propriety of special verdicts, 1128.

definition, 1029.

distinction from assumption of risk, 1006.

confusing with contributory negligence, instructions, 1012.

modification by Federal Act, purpose of Congress, 1034.

pleading, necessity, determination by state law, Employers' Liability Act, 1050.

contributory negligence, Safety Appliance Act, Ch. XLVIII, 1400-1415.

application of state statutes abolishing defense, 1407.

choosing dangerous way to uncouple cars, instructions held erroneous, 1412.

distinction from assumption of risk, 1403.

effect of Employers' Liability Act, 1404.

employee engaged in intrastate commerce, 1406.

matter of law, choosing dangerous way to uncouple cars, safe method available, 1409.

going between cars to uncouple, employee held not negligent, 1414.

no air brakes on logging trains, 1409.

no defense, effect of Federal Employers' Liability Act, 1406.

proximate cause of injury, recovery prohibited when employee's negligence is sole cause of injury, 1322.

**Negligence—Continued.**

contributory negligence, etc.—continued.

question of fact, 1414.

rule prohibiting going between moving cars, effect, 1408.

death, see DEATH BY WRONGFUL ACT.

definition by United States Supreme court, Employers' Liability Act, 926.

determination according to decisions of Federal courts, conflict of decision, Employers' Liability Act, 928.

final decision of Supreme court, 933.

limitation of liability, contract against carrier's own negligence, invalidity, stipulation filed with Commission, 578.

loss and damage, carrier's liabilities at common law, exceptions exempting carriers, 574.

contracts against loss by fire not due to negligence, 576.

initial carrier's liability, bill of lading not issued, effect, 583.

law prior to Carmack Amendment, 536.

presumption of negligence against initial carriers, terminal carriers not liable, 601.

presumption of negligence of terminal carriers, conflict of decisions, 600.

master and servant, power of Congress to regulate, scope, nature and extent of power, 689.

minors, prohibition of employment by state laws, effect in determining negligence, Employers' Liability Act, 950.

proximate cause,

acts of employees and defects of equipment used in intrastate commerce as cause of injury, Employers' Liability Act, 973.

assumption of risk, defense not available, number of causes of injury, Employers' Liability Act, 1014.

automatic couplers, employees entitled to protection of Safety Appliance Act, 1345.

employees between cars for other purposes, 1348.

carrier's liability for injury due in whole or in part from negligence, Employers' Liability Act, 955.

comparative negligence, gross negligence of plaintiff and slight negligence of defendant, recovery not prevented, Employers' Liability Act, 1039.

contributory negligence, damages not reduced, violation of Federal statutes causing injury, action under Employers' Liability Act, 1048.

instruction, errors, Employers' Liability Act, 1045.

recovery prevented where employee's act is sole cause, Employers' Liability Act, 1041.

reduction of damages, negligence of employee must be proximate cause, Employers' Liability Act, 1039.

death, damages recoverable under Employers' Liability Act, measure of damages, instructions approved, 1120.

**Negligence—Continued.**

proximate cause—continued.

defective equipment must be proximate cause, action for damages, Safety Appliance Act, 1326.

injury due solely to act of employees, no recovery, Federal Employers' Liability Act, 959, 961.

injury or death due, "in whole or in part," to negligence, meaning of phrase, Employers' Liability Act, 945.

loss and damage, initial carrier's liability, delay and act of God destroying property, federal rule as to negligence, 595.

necessity, Employers' Liability Act, 942.

question not ordinarily for jury, Safety Appliance Act, 1327.

relief fund, acceptance of benefits by employe, actions against joint tort-feasors not barred, Employers' Liability Act, 1134.

res ipsa loquitur, applicability of rule to actions under Employers' Liability Act, 951.

conflict of decisions, 951.

Safety Appliance Act, liability under, basis, nature and extent, Ch. XLII, 1306-1327.

telegraph companies, state laws superseded by federal control under Interstate Commerce Act, 248.

willful wrongs not within Employers' Liability Act, 976.

**New trial,**

death, damages recoverable under Employers' Liability Act, reduction because of contributory negligence, cure of error by remittitur, 1127.

propriety of granting, action under Employers' Liability Act, 1245.

**Nitroglycerin,**

see EXPLOSIVES.

**Notice,**

assumption of risk, application of doctrine, analysis of decisions, Employers' Liability Act, 996.

ordinary, known or obvious risks assumed by employees, 987.

exceptions, promise to repair, 992.

contributory negligence as matter of law, choosing dangerous way to uncouple cars, safe method available, Safety Appliance Act, 1409.

knowledge of defect by employe, suit not barred, Safety Appliance Act, 1318, 1402.

limitation of liability, notice of claims, regulation by statute, Cummins Amendment, 568.

loss and damage, initial carrier's liability, causes leading to enactment of Cummins Amendment to Carmack Amendment, agreed valuation clause in bill of lading, notice of loss, 558.

rates, publication and filing, changes prohibited, thirty days' notice to Interstate Commerce Commission, 448.

**Notice—Continued.**

rates, publication and filing, etc.—continued.

damages for failure to post rates not recoverable, 475.

presumption of knowledge of published schedules by shippers and passengers, 460.

**O.****Officers,**

Board of Adjustment, order of director general of railroads, 1748.

boiler inspection,

Chief Inspector, appointment by President, 1492.

district inspectors, duties, enforcement of, 1494.

districts, fifty inspection districts created, 1493.

Commission to observe Adamson Eight-Hour Wage Law, appointment by President, 1508.

text of statute, 1674.

director general of railroads, general orders, federal control, 1678-1783.

duties under Accident Reports Act, 1506.

federal treasurers, duties, order of director general of railroads, 1772, 1774.

Interstate Commerce Commission, see INTERSTATE COMMERCE COMMISSION.

limitation of officers of carriers, order of director general of railroads, 1687.

salaries of Interstate Commerce Commission, text of statute, 1535, 1545, 1548.

**Oil,**

Ash Pan Act, statute not applicable to electric locomotives, 1503.

discrimination, difference in rates based upon difference in service not discriminatory, 326.

oil shipped in barrels and in tank cars, justifiable discrimination, 414.

Interstate Commerce Act not applicable to all interstate commerce, 300.

interstate commerce, evidence held sufficient to show, Employers' Liability Act, 1223.

pipe line companies,

carriers subject to Interstate Commerce Act, 201.

transportation of companies' own commodity, 241.

transportation of oil and other commodities, 241.

Interstate Commerce Commission, extension of power of Commission and scope of Interstate Commerce Act, by Hepburn Act, 166, rates, publication and filing, Interstate Commerce Act mandatory, 437.

refining, temporary stopping or interruption of shipments, interstate character not changed, 276.



**Operators,**

limitation upon hours of service, Hours of Service Act, 1462.

**Orders,**

compliance with, order of director general of railroads, 1685.

general orders of director general of railroads, federal control, 1673-1783.

Interstate Commerce Commission,

boiler inspection, 1640-1668.

compliance with, rules, 1584.

drawbars, height, 1376.

duty not to be delegated or evaded, 1382.

instructions erroneous under old and new orders, 1379.

instructions erroneous under old order, correctness under new order, 1379.

enforcement, service, duties of carriers, 683.

necessity for appliances not affected by order, 1373.

power, monthly reports showing violation of Hours of Service Act, 1440.

safety appliances, 1598-1632.

switch connections, power of Commission, 655.

text of statute, 1529.

judicial notice, orders of Interstate Commerce Commission, action under Safety Appliance Act, 1422.

rules of procedure, power of Commerce Commission to formulate, 671.

**P.****Painters,**

engagement in interstate commerce, Employers' Liability Act, 814, 849.

**Panama Canal,**

federal jurisdiction over water carriers, extension by Panama Canal Act of 1912, 218, 220.

extension of jurisdiction of Commerce Commission, 195.

railroads, subjection to Employers' Liability Act, 758.

rates, through routes and joint rates, establishment, power of Interstate Commerce Commission, 648.

territories, District of Columbia, application of Safety Appliance Act, 1269.

text of Interstate Commerce Act, competition, 1519.

water lines, Commerce Commission may authorize railroads to continue ownership, 652.

control or ownership of carrier by rail, prohibition, approval of Commerce Commission, 223.

policy of Congress, 224.

**Parent and child,**

damages recoverable, Employers' Liability Act,

abandonment of wife and child, effect as to recovery, 1087.

**Parent and child—Continued.**

damages recoverable, Employers' Liability Act—continued.

pecuniary loss not dependent on legal liability of employe to beneficiaries, 1082.

alien dependents, recovery under act, 1055.

appeal, federal question, petition not stating good cause of action under Federal Act, 1166.

apportionment, excessive apportionment to one beneficiary, effect, 1126.

apportionment to each beneficiary in verdict, 1129.

beneficiaries, 1053.

existence as jurisdictional, 1056.

illegitimate children, 1059.

"next of kin," determination by state law, 1058.

common law rights, recovery for loss of services, law superseded, 728.

contributions by deceased, necessity of showing, 1093, 1100.

dependency of next of kin, not created by gifts, 1110.

what constitutes, 1106.

distribution of damages controlled by Federal statute, 1082.

settlement by payment of lump sum, 1083.

earning capacity, necessity of evidence of deprivation, 1092.

elements, loss of care, training of minors, 1089.

loss of society and wounded affections not elements, 1088.

limitations, pleading, amendments allowed after two-year period, 1215.

loss of future benefits limited to present cash value, 1079.

measure of damages, instructions approved, 1120.

instructions held erroneous, 1116.

various beneficiaries, 1111.

minors, prohibition of employment by state laws, effect in determining negligence, 950.

necessity of pecuniary loss, 1063.

pain and suffering, award where death is not instantaneous, 1066.

compensation for loss, future earnings not recoverable, 1069

limitation to pain suffered before death, 1068.

no recovery prior to 1910 Amendment, 1070.

no recovery where death is instantaneous, 1071.

parents not entitled to damages when there is widow or children, 1054.

parties, death case, suit only by personal representative, 1170.

pecuniary loss, applicability of state statute entitling father to earnings of children, 1126.

petition, death cases, survival of beneficiaries, necessity of alleging, 1200.

presumption of damages to widow and child, non-existence, 1086.

removal of causes, petition not stating cause of action under Federal Act although so intended, 1152.

**Parent and child—Continued.**

damages recoverable, Employers' Liability Act—continued.

settlement with one beneficiary, action by personal representative not defeated, 1128.

statutory provision, 1062.

text of statute as amended, 1590-1592.

**Parties,**

complaints to Commerce Commission, 664.

essentials when reparation is sought, 672.

filing before Commission, rules governing, 671.

damages for violation of Interstate Commerce Act, assignment of claims for damages, 526.

award, authority of courts and commission, 485.

parties entitled to damages, excessive freight charges, consignors and consignees, 506.

rates, arbitrary sum added to sale price to cover excessive charges, right of shipper to reparation, 507, 508.

Employers' Liability Act, Ch. XXXV, 1170-1178.

ancillary administrator may sue, 1175.

beneficiaries, Ch. XXX, 1053-1060.

dependency of next of kin, 1104.

necessity of pecuniary loss, 1063.

survival of beneficiaries, necessity of alleging, 1200.

defendants, agents and servants causing injury, non-liability, 1177.

lessor of railroad, 1177.

elections, cause of action under state law and Employers' Liability Act, motion to elect before trial, sustaining, 1231.

former adjudication, action under state law as bar to action under Employers' Liability Act, 1241.

commencement of action under state law not bar to suit under Federal Act, 1240.

limitations, pleading, amendments allowed after two-year period, 1215.

personal representative, action in state other than where appointed, necessity of consent, 1178.

revival of suit by personal representative only, 1176.

suit only by personal representative, 1170.

want of legal capacity to sue in widow cannot be waived, 1173.

widow cannot sue although sole beneficiary, 1172.

practice rules of Interstate Commerce Commission, 1575.

**Partnerships,**

subjection to Interstate Commerce Act, 260.

**Passenger cars,**

see CARS.

**Passengers,**

see CARRIERS.

**Paupers,**

actions by poor persons, permitting, Employers' Liability Act, 1248.  
free transportation of destitute persons, reduced rates for transportation of poor persons, disabled soldiers, etc., Amendment of 1889 to Interstate Commerce Act, 161.  
prohibition of giving of passes by Hepburn Act, exceptions, 181.  
text of Interstate Commerce Act, 1515, 1543.

**Payment,**

claims for loss and damage, order of director general of railroads, 1779-1781.

**Peddlers,**

interstate transportation, carriers not compelled to furnish peddling service, 299.

**Penalties,**

accident reports, text of federal statute, 1672.  
accounts, records and memoranda of carriers, control of Commerce Commission, 185, 656.  
action for penalties, Safety Appliance Act, procedure controlled by state rules, 1419.  
    plaintiff not required to negative proviso, 1420.  
    recovery not criminal action, 1425.  
actions for personal injuries, Safety Appliance Act, similarity to actions for penalties, 1313.  
Adamson Eight-Hour Wage Law, violation of, 1509.  
air brakes, necessity of operation, hand brakes prohibited, Safety Appliance Act, 1334.  
appeal, penalty added to judgment on affirmance, action under Employers' Liability Act, 1247.  
Ash Pan Act, violation, penalties, 1502.  
    text of act, 1671.  
automatic couplers, defect as offense, Safety Appliance Act, 1360.  
Boiler Inspection Act, violation, penalties, 1498.  
cars,  
    delivery of cars for interstate shipment, state regulations superseded by Hepburn Act, 77.  
    hauling cars with defective appliances over other railroads, penalty, 1282.  
    repair, application of Safety Appliance Act, 1316, 1318.  
construction of Safety Appliance Act, rules as to criminal statutes not applicable, 1266.  
damages for violation of Interstate Commerce Act, jurisdiction of courts and commission, Ch. XIV, 484, 527.  
defects, care and diligence in discovering and repairing no defense to action, Safety Appliance Act, 1319.

**Penalties—Continued.**

defects, care and diligence, etc.—continued.

employees' act causing appliances to become defective, no defense, Safety Appliance Act, 1325.

discrimination, action for unlawful discrimination, evidence of injury, measure of damages, 320.

free passes, prohibition of giving of passes by Hepburn Act, exceptions, 181.

Hours of Service Act, construction, remedial statute to be liberally construed, 1443.

exceptions to Hours of Service Act, burden of proving upon carrier, 1486.

penalties, violation of statute, 1444.

separate penalty for each employe kept on duty beyond statutory period, 1444.

text of act, 1634.

violation of statute, duty of Interstate Commerce Commission, 1444.

information relating to business of interstate shippers, prohibition against carriers and agents giving information, 194.

interference with interstate commerce, text of statute, 1550.

Interstate Commerce Act, penalties for violation, Amendment of 1889, 160.

text of act, 1515.

knowledge of defect, evidence not element of violation of statute, Safety Appliance Act, 1318.

loss and damage by shippers, fraudulent claims against carriers penalized, amendment to Interstate Commerce Act, 189.

initial carrier's liability, Carmack Amendment, state laws superseded, 541.

object and purpose of enacting Second Cummins Amendment, 561.

operation of appliances, employe's failure to operate appliance no offense, Safety Appliance Act, 1324.

orders of Commerce Commission, enforcement, service, duties of carriers, 683.

"preponderance of evidence," definition, actions for penalties under Safety Appliance Act, 1427.

prohibition of rebates and discrimination, amendment to Interstate Commerce Act, Elkins Act of 1903, 164.

rates, Interstate Commerce Commission, amendments and additions to statute by Mann-Elkins Act, 187.

publication and filing, penalty for making erroneous quotation of rate, damage to shipper, 473.

regulations violated, text of Interstate Commerce Act, 1521.

remedy for recovery, Safety Appliance Act, 1425.

**Penalties—Continued.**

- repair of cars, Safety Appliance Act,
  - movement for repairs, relief from penalty, liability for personal injuries not affected, 1396.
  - movement from repair point prohibited, 1389, 1390.
- reports, failure to make report within thirty days after end of each month, Accident Reports Act, 1505.
- Safety Appliance Act as amended, text, 1594, 1597.
  - burden of proof, 1426.
  - carrier's liability for each car hauled, 1425.
  - penalties, action for, Ch. L, 1425-1427.
- shipments, privileges, order of director general of railroads, violation, 1777.
- telegraph companies, state laws superseded by federal control under Interstate Commerce Act, 248.
- text of Interstate Commerce Act, 1523, 1524.
- Twenty-Eight-Hour Live Stock Law, violation of, 1489.
  - recovery in civil action, 1490.
  - text, 1670.
- war, commodities essential to national defense, President authorized to direct movement of, 198.
  - federal control of carriers during war with Germany, penalty for violation of federal statute, 132.

**Perjury,**

- witnesses, testimony before Interstate Commerce Commission, invalid provision of statute remedied by enactment of Compulsory Testimony Act, 162.

**Personal injuries,**

- see EMPLOYERS' LIABILITY ACT; MASTER AND SERVANT; NEGLIGENCE, etc.

**Physicians,**

- free passes, prohibition of giving of passes by Hepburn Act, exceptions, 181.

**Pleading,**

- amendments, Employers' Liability Act, procedure, controlling effect of state laws, 733.
  - power of Commerce Commission, 677.
  - see also title AMENDMENTS.
- answer, Interstate Commerce Commission, approved form, 1587.
  - rules, 676, 1577, 1585.
- appeal, federal question, manner of asserting, Employers' Liability Act, 1164.
  - pleading federal act and submitting case under state law, federal right not denied, 1165.
  - pleading in state courts not federal questions, 1167.

**Pleading—Continued.**

appeal, federal question, etc.—continued.

right to writ of error not always raised by pleadings, 1163.

statute requiring pleading of Federal Act, no denial of federal right, 1167.

applications of carriers, relief by Interstate Commerce Commission, 675.

assumption of risk, pleading of defense, necessity, Employers' Liability Act, 1017.

complaints to Interstate Commerce Commission,

approved form, 1585.

essentials when reparation is sought, 672.

rules governing, 671, 1576, 1585.

text of statute, 1528.

contributory negligence, evidence admissible under general denial, Employers' Liability Act, 1051.

pleading, necessity, determination by state law, Employers' Liability Act, 1050.

demurrer, cause of action under state law, recovery under Employers' Liability Act, omission supplied by answer, 1186.

death, beneficiaries, Employers' Liability Act, settlement with one beneficiary, action by personal representative not defeated, 1128.

parties, death cases, want of legal capacity to sue in widow cannot be waived, Employers' Liability Act, 1173.

writ of error, evidence insufficient to show liability, 1160.

election, see ELECTION.

Employers' Liability Act, pleadings, XXXVI, 1179-1218.

sufficiency, state law controlling, 1197.

hearing before Commerce Commission, stipulations, 679.

Interstate Commerce Commission, rules governing pleadings, 674.

intervening petition, approved form, Interstate Commerce Commission, 1587.

limitations under Employers' Liability Act,

amendment setting up new cause of action not allowed, action barred, 1210.

amendments allowed after two-year period, 1215.

estoppel or fraud may not avoid limitation period, 1140.

plea of limitation not required when suit is barred, 1138.

time of commencement of action as question of procedure, 1143.

petition, Employers' Liability Act,

allegation as to engagement in interstate commerce held sufficient, 1197.

allegations held not sufficient, 1199.

cause of action under Federal Act, no recovery under state statutes, 1183.

cause of action under state law and Federal Act, different counts allowed, 1193.

**Pleading—Continued.**

petition, Employers' Liability Act—continued.

cause of action under state law, evidence showing case under Federal Act, recovery prevented, 1204.

necessity of showing Federal Act to prevent recovery, 1207.

recovery under Federal Act, omission supplied by answer, 1186.

recovery where evidence shows case under Federal Act, harmless error, 1189.

cause of action under state or common law, application of Federal Act may be raised by answer, 1203.

death cases, pecuniary loss to beneficiaries must be alleged, 1201.

survival of beneficiaries, necessity of alleging, 1200.

necessity of showing injury or death under conditions described in statute, 1179.

reference to Federal Act not required, facts showing liability, 1195.

petition, Safety Appliance Act,

action for penalties, procedure controlled by state rules, 1419.

actions for personal injuries, petition need not refer to statute, 1420.

interstate employment not alleged, submission of case not error, 1421.

plaintiff not required to negative proviso, 1420.

pleading use of car in interstate commerce, 1421.

rates, suspension of tariff schedules, form of application, Interstate Commerce Commission, 675.

removal of causes, petition not stating cause of action under Employers' Liability Act although so intended, 1152.

petition stating cause of action under state and federal statutes, 1149, 1150.

Safety Appliance Act, pleading, actions for personal injury, Ch. XLIX, 1416-1424.

stipulations, rules of Interstate Commerce Commission, 1579.

**Police,**

employees engaged in interstate commerce, police duties, watchmen and detectives, Employers' Liability Act, 901.

**Police power,**

appliances on interstate trains, regulation of heating and operation, validity of state laws, 97.

employees engaged in interstate commerce, power of state to regulate, absence of federal legislation, 98.

employees managing trains, validity of state laws requiring full crews, absence of federal legislation, 92.

illegitimate subjects of trade and commerce, prohibition of importation or exportation by states, interstate commerce, 25.

interstate commerce, regulations of Congress, validity, 50.



**Politeness,**

see COURTESY.

**Politics,**

prohibition from participation in, by employes and officers, order of director general of railroads, 1782.

**Porter,**

contracts, prohibition of Employers' Liability Act, limitation of statute to employes of carrier, 1134.

employes engaged in interstate commerce, material and supplies, procuring for interstate trains, Employers' Liability Act, 894.

Pullman employes, 908.

negligence, evidence held to show actionable negligence, Employers' Liability Act, 962.

**Porto Rico,**

applicability of Safety Appliance Act, 1281.

**Post office,**

mail, engagement in interstate commerce, Employers' Liability Act, 901, 904.

war, obstruction of movement of interstate commerce as crime, Amendment of 1917 to Interstate Commerce Act, 197.

**Practice,**

see TRIAL.

**Preferences,**

see DISCRIMINATION.

**President,**

Adamson Eight-Hour Wage Law, Commission to observe, appointment by President, 1508.

Chief Inspector, appointment, Boiler Inspection Act, 1492.

control of carriers, see WAR.

**Process,**

Interstate Commerce Commission, method of serving papers, 676.

orders, enforcement, 683.

rules of Commission, 1578.

text of Interstate Commerce Act, 1546.

limitations, Employers' Liability Act, time of commencement of action as-question of procedure, 1143.

loss and damage to interstate shipments, initial carrier's liability, Carmack Amendment, action in domicile of terminal carrier prohibited, 550.

prohibition of attachment and garnishment, order of director general of railroads, 1783.

**Railroads—Continued.**

- carrier's duty, Safety Appliance Act, Ch. XLV, 1363-1375.
- requirements as to interstate character prior to 1903 Amendment, 1286.
- cars,
  - Commission without authority to compel furnishing of special kinds of cars, 635.
  - defective cars, containing live stock or perishable freight, moving with chains, 1397.
  - employees' act causing appliances to become defective no defense, 1325.
  - hauling over other railroads, penalty, 1282.
  - liability of railroad for condition of foreign cars, 1325.
  - negligence under Employers' Liability Act, 912.
  - right of carrier to refuse defective cars supplied by connecting lines, 1326.
- empty cars,
  - hauling as interstate commerce, Employers' Liability Act, 763.
  - hauling over state lines, Safety Appliance Act, 1301.
  - reshipments from point of delivery, change of interstate character of shipment, Employers' Liability Act, 767.
  - exchange of cars, amendment to Interstate Commerce Act, 187.
  - interstate character, cars hauled in interstate trains, Safety Appliance Act, 1299.
  - intrastate and interstate cars, inclusion by Safety Appliance Act as amended, 1270.
  - intrastate cars, relation to interstate commerce, Safety Appliance Act, 1274.
- loading and unloading, order of director general of railroads, 1684.
- no distinction between passenger and freight cars, Safety Appliance Act, 1277.
- repair, application of Safety Appliance Act, 1316, 1318.
  - at time of discovery of defect, necessity, 1388
  - right to move in revenue trains or with other cars, 1391.
- rules of carriers governing distribution and exchange power of Interstate Commerce Commission, 642.
- cars not furnished, damages for violation of Interstate Commerce Act, jurisdiction of state courts not wholly superseded, 501.
- charges, cash basis, order of director general of railroads, 1706.
- charges to capital account, work, order of director general of railroads, 1691.
- classification, general orders of director general of railroads, 1681.
- common carriers, application of Safety Appliance Act, 1285.
  - definition of term as used in Interstate Commerce Act, 202.
  - distinguished from industrial railways, plant facilities, 203.

**Railroads—Continued.**

- “common control, management or arrangement for a continuous carriage or shipment,” definition and explanation of term in Interstate Commerce Act, 216.
- comparative negligence, different theories, adoption of theory by Employers’ Liability Act, 1033.
  - recovery not prevented, 1039.
- competing water lines, control or ownership of carrier by rail, prohibition, approval of Interstate Commerce Commission, Panama Canal Act, 223.
  - policy of Congress, 224.
- complaints to Commerce Commission, absence of direct damage not ground for dismissal, 666.
- connection between railroads and water carriers, establishment by Commerce Commission, 658.
- contracts, duties imposed by Safety Appliance Act not to be evaded by contract, 1323.
- contributory negligence, Employers’ Liability Act, .
  - apportionment of damages, manner, 1041.
    - difference from Georgia statute, 1038.
  - burden of proof on defendant, 1049.
  - damages not reduced, violation of Federal statutes causing injury, 1048.
  - defense, recovery not barred, 1029.
  - definition, 1029.
  - distinction from assumption of risk, 1006.
  - evidence admissible under general denial, 1051.
  - instructions, duty of court to instruct, 1043.
    - errors, 1045.
    - language of statute not erroneous, 1045.
    - manner of instructing, 1044.
  - modification by Federal Act, purpose of Congress, 1034.
  - no defense, violation of Safety Appliance Act, 1406.
  - pleading, necessity, determination by state law, 1050.
  - provision of Federal Act, 1028.
  - proximate cause, recovery prevented where employee’s act is sole cause, 1041.
  - reduction of damages, negligence of employee must be proximate cause of injury, 1039.
- contributory negligence under Safety Appliance Act, Ch. XLVIII, 1400-1415.
  - distinction from assumption of risk, 1403.
  - effect of Federal Employers’ Liability Act, 1404.
  - matter of law, going between cars to uncouple, employee held not negligent, 1414.
  - no air brakes on logging trains, 1409.
- courtesy of employees, order of director general of railroads, 1777.
- death, see DEATH BY WRONGFUL ACT.

**Production of books and papers,**

evidence of interstate shipments, orders of Interstate Commerce Commission, statutory provisions, Employers' Liability Act, 1220.  
interstate commerce, method of proving engagement in, Employers' Liability Act, 1221.  
power of Interstate Commerce Commission, Amendment of 1891, 162.

**Property,**

classification of freight, preferences, distinction between property, competition, 403.  
valuation of property of interstate carriers, duty of Interstate Commerce Commission under Act of 1913, 195.

**Publication,**

rates, contracts, text of Interstate Commerce Act, 1520.  
prohibition of filing increases without approval of Commission, 642.  
reports of accidents, publication by Interstate Commerce Commission, Boiler Inspection Act, 1498.  
reports not to be used in damage suits, Accident Reports Act, 1505.

**R.****Railroad Wage Commission,**

increase of wages, order of director general of railroads, 1709-1734.

**Railroads,**

Accident Reports Act, Ch. LV, 1504-1506.  
accounting, order of director general of railroads, 1697.  
settlement, 1752.  
use of equipment, 1754.  
air brakes, see BRAKES.  
application of Employers' Liability Act, carriers engaged in foreign commerce, 749.  
interurban electric railroads, 752.  
lessor of railroad, 750.  
railroad wholly within single state, 742.  
tap lines and logging roads, 740.  
application of 28-Hour Live Stock Law, animals properly cared for, statute not applicable, 1490.  
apportionment of revenues, order of director general of railroads, 1702, 1769.  
Ash Pan Act, Ch. LIV, 1502-1503.  
duties of Interstate Commerce Commission, 1502.  
federal statute requiring equipment, 1502.  
receivers as "common carriers," 1503.

Ash Pan Act,—continued.

Ash Pan Act, Ch. LIV, 1502-1503—continued.

statute not applicable to electric locomotives, 1503.

text of federal statute, 1671.

violation, penalties, 1502.

assumption of control, order of director general of railroads, 1701.

assumption of risk, Employers' Liability Act,

abolition or modification by state constitution and statutes, effect, 984.

application of doctrine, analysis of federal decisions, 996.

burden of proof on defendant, 1017.

confusing with contributory negligence, instructions, 1012.

defense not available, number of causes of injury, 1014.

violation of rules, 1015.

violation of Safety Appliance Act, 1008.

defense to negligence of fellow-servants, 993.

defense under act, conflict of decisions, 979, 982.

determination, controlling effect of federal decisions, 986.

distinction from contributory negligence, 1006.

employees held not to have assumed risk, 1023.

employees held to have assumed risk, 1018.

instruction applicable to evidence, necessity of giving, 1015.

omission of instruction as harmless error, 1016.

ordinary, known or obvious risks assumed by employees, 987.

exceptions, promise to repair, 992.

pleading of defense, necessity, 1017.

provision of Federal Act, 978.

risks assumed, violation of state statutes not included, 1011.

assumption of risk under Safety Appliance Act, Ch. XLVIII, 1400-1415.

automatic couplers, statutory requirements, Safety Appliance Act, Ch. XLIV, 1339-1362.

defect as offense, use of coupler not necessary, 1360.

object of Congress in requiring, 1340.

baggage of passengers, regulations and rules, control of Commerce Commission, 290.

rates, Interstate Commerce Commission, amendments and additions to statute by Mann-Elkins Act, 187.

belt lines, interstate status, Safety Appliance Act, 1290.

beneficiaries under Employers' Liability Act, see EMPLOYERS' LIABILITY ACT.

Board of Adjustment, order of director general of railroads, 1692, 1748.

boiler inspection, see BOILER INSPECTION ACT.

carload freight, Commerce Commission may not compel receipt and switching to industries on carrier's terminals, 649.

**Railroads—Continued.**

definition,

Boiler Inspection Act, 1498, 1635.

Hours of Service Act, 1444, 1633.

Interstate Commerce Act, 167, 300, 1513.

bridges as railroads, 226.

ferry included, 214.

street railroads, 230.

demurrage, control of Commerce Commission, 294.

depots, Interstate Commerce Act not applicable to all interstate commerce, 300.

discrimination by railroads,

common law rules, 304.

definition by Interstate Commerce Act, origin and history, 306.

applicability to subsequent amendments, 312.

purpose of definition, 307.

equality required in dealing with shippers, equal facilities to be afforded, 324.

exclusive privileges, auxiliary facilities at stations and terminal grounds, legality, 339.

grant of wharfage privilege denied to other shippers, 351.

interchange of traffic, use of terminal facilities, denial of use to certain carriers, 334.

prohibition of Interstate Commerce Act, judgments by consent and waiver of defenses prohibited, 319.

railroad discriminating against steamship lines, power of Commerce Commission, 657.

rates, see **RATES AND CHARGES**.

unlawful preferences between cities and localities, Ch. X, 373-398.

shortage of cars, equal distribution among shippers necessary, 342.

statutory definition, comparison of all facts and circumstances required, 316.

storage regulations, preferences prohibited, 361.

track storage and demurrage charges, 345.

drawbars, Safety Appliance Act, Ch. XLVI, 1376-1384.

see title **DRAWBARS**.

electric interurban railroads subject to Interstate Commerce Act, engaging in interstate commerce, 233.

Employers' Liability Act, carriers subject to, 758.

carrying passengers only, 754.

general rule as to when railroad is engaged in interstate and foreign commerce, 738.

employees,

Boiler Inspection Act, employees subject to, 1491.

compensation,

Adamson Eight-Hour Wage Law, railroads and employees excepted, 1507.

**Railroads—Continued.****employees—continued.**

- reduction of wages pending report of commission prohibited, 1508.
- text, 1674.
- increases, order of director general of railroads, 1709-1734.
- supplementary orders, 1756-1769.
- definition, Boiler Inspection Act, 1498, 1635.
- Hours of Service Act, 1633.
- free passes, prohibition of giving of passes by Hepburn Act, exceptions, 181.
- prohibition by order of director general of railroads, 1683.
- hours of service,
  - Adamson Law, Ch. LVI, 1507-1509.
  - purpose, scope and validity of Hours of Service Act, Ch. LI, 1431-1446.
  - excuses and exceptions, 1470-1486.
  - limitations upon hours of service, 1447-1470.
- interstate employment, Employers' Liability Act,
  - abandonment of work, effect, 795.
  - act may constitute interstate employment in one relation and not in another, 778.
  - application of decisions construing Safety Appliance Act, 800.
  - bridge workers, 814.
  - burden of proof upon defendant, 808.
  - burden of proof upon plaintiff, 807.
  - carpenters, 814.
  - coal for engines, dumping into chutes and tenders, 900.
    - supplying and moving, 897.
  - construction and repair work, Ch. XXIV, 809-852.
  - construction work, future use in interstate commerce, 810.
    - repair of railroads, distinction, 813.
  - drainage, excavating ditches, 834.
  - effect of employment in both intrastate and interstate commerce, 783.
  - employment not limited to actual transportation to another state, 778.
  - erection of foundation for new bridge under old bridge used for interstate commerce, 818.
  - erroneous decisions holding employment to be interstate, 806.
  - erroneous decisions holding employment to be intrastate, 803.
  - express company's agent, 907.
    - employment by railroad and express company, 908.
  - going to and from work, employment in intrastate and interstate commerce, 790.
  - employees on premises, 784.

**Railroads—Continued.**

## employees—continued.

- iron worker carrying material to repair bridge, 815, 818.
- limitation of act to interstate employees, 774.
- linemen, repairing telegraphs and telephones, 851.
- loading and unloading freight, 901.
- mail, handling by employees, 904.
- material and supplies, procuring for interstate trains, 894.
- miscellaneous employees, 909.
- painters, 849.
- police duties, watchmen and detectives, 901.
- preparing trains for interstate movement, 860.
- presumption, 781.
- prior or subsequent employment immaterial, 782.
- Pullman employees, 908.
- rails, handling of rails by employees, 826.
  - removing old rails and storing new ones, 828.
- removing bolts from timbers taken from interstate bridges, 819.
- repairs,
  - buildings, depots and roundhouses, employment not interstate, 835.
  - cars and engines, 841, 842, 843, 845, 847, 849.
  - employment not interstate, 847.
  - machine shops, roundhouses and other buildings, 836, 840.
  - sectionmen and track laborers, 821.
  - shopmen in terminal yards, 843, 845, 847.
  - tracks, handling ballast, gravel, etc., 833.
  - turntables, 824.
- survey of track to improve road, 826.
- switching crews, 891.
  - cars loaded with lumber for repair and construction work, 890.
  - cars to be loaded with interstate freight, 881.
  - "making up" and "breaking up" trains in yards, 866.
  - making up trains of other companies, 891.
  - moving cars between interstate journeys, 886.
  - moving intrastate cars, 879.
  - repair of loaded cars, 885.
  - termination of interstate journey, receipt by consignee, 884.
- switching intrastate cars into or out of interstate trains, conflicting decisions, 867.
  - federal control under United States decision, 871.
  - test in determining interstate employment, 873, 877.
- temporary cessation of work, effect, 795.
- termination of interstate status by delivery of cars at destination, 887.



**Railroads—Continued.**

employees—continued.

termination of work, sleeping in cars, 792.

tests adopted by United States Supreme court, 779.

ties, laborers handling ties, 831.

train and switching crews, Ch. XXV, 853-893,

trainmen, beginning and end of federal control, 863.

return trips by trains carrying out interstate freight, 865.

trainmen not engaged in interstate commerce, 857.

trainmen on interstate trains, 853.

transportation of employee's own property not subject to Federal Act, 796.

weighing cars after unloading, 883.

wrecks, removing debris and constructing temporary tracks, 825.

yard clerks, 903.

managing trains, validity of state laws requiring full crews, absence of federal legislation, 92.

negligence, Employers' Liability Act.

abolition of fellow-servant rule, 912.

acts of employees and defects of equipment used in intrastate commerce, as cause of injury, 973.

criterion of liability, ordinary care of railroads required, 914.

definition by United States Supreme court, 926.

determination according to decisions of Federal courts, conflict of decision, 928.

final decision of Supreme court, 933.

duty imposed by Safety Appliance Act, violation causing injury as authorizing recovery under Liability Act, 921.

evidence, direct or positive proof not required, 925.

sufficiency not governed by decisions of state courts, 949.

evidence held not to show actionable negligence, 969.

evidence held to show actionable negligence, 962.

injury caused by servant acting within scope of employment, necessity, 936.

injury or death due, "in whole or in part," to negligence, meaning of phrase, 945.

intrastate employees not entitled to benefit of statute, 975.

liability of railroad for acts of officers and employees, statute not limited to acts of fellow-servants at common law, 924.

minors, prohibition of employment by state laws, effect in determining negligence, 950.

presumption of negligence created by state statute, applicability of Mississippi statute, 948.

state statute not applicable, 946.

provision imposing liability for negligence, 912.

proximate cause, carrier's liability for injury due in whole or in part from negligence, 955.

**Railroads—Continued.**

employees—continued.

- necessity, 942.
- proximate cause of injury due solely to act of employees, no recovery, 959, 961.
- res ipsa loquitur, applicability or rule, conflict of decisions, 951.
- violation of Safety Appliance Act, evidence of negligence not required, 1320.
- repairs, movement for repairs, relief from penalty, liability for personal injuries not affected, Safety Appliance Act, 1396.
- explosives, interstate transportation, federal control, 298.
- regulations for transportation, Commerce Commission may formulate, 655.
- text of federal statute, 1676.
- express companies not common carriers by railroad, Employers' Liability Act, 757.
- federal treasurers, duties, order of director general of railroads, 1772, 1774.
- fidelity bonds, charge of premiums, order of director general of railroads, 1772.
- grab irons, see HANDHOLDS.
- hand brakes, see BRAKES.
- carrier's duty, Safety Appliance Act, Ch. XLV, 1363-1375.
- headlights, state laws superseded by Boiler Inspection Act, as amended, 1500.
- validity of state statutes requiring appliances on interstate trains, 97.
- industry tracks, order of director general of railroads, 1696.
- inspection of locomotive boilers, rules controlled by Commerce Commission, 660.
- insurance, order of director general of railroads, 1705.
- interstate commerce,
  - applicability of Employers' Liability Act, statutory rules, 717.
  - evidence held not sufficient to show, Employers' Liability Act, 1224.
  - industrial railroads engaged in, Safety Appliance Act, 1298.
  - interurban electric railroads engaged in, Safety Appliance Act, 1296.
  - method of proving engagement in, railroad employees, Employers' Liability Act, 1221, 1223.
  - preparation, switching cars in yards, application of Safety Appliance Act, 1300.
  - railroads in one state transporting freight, continuous shipment without traffic agreement with other carriers, Safety Appliance Act, 1293, 1294.
  - re-billing not controlling in determining character of shipment, Safety Appliance Act, 1301.

**Railroads—Continued.**

interstate commerce—continued.

- receipt and delivery of goods, inclusion in transportation, 272.
- reshipments from delivery, interstate character of shipment not changed, Employers' Liability Act, 770.
- Safety Appliance Act, Ch. XLI, 1283-1305.
- transportation for express companies, Safety Appliance Act, 1304.
- transportation of company property over state lines, 1304.
- transportation, passing through another state to point in same state, Safety Appliance Act, 1298.
- Interstate Commerce Act, carriers subject to, 201.
  - act not applicable to all interstate commerce, 300.
  - all carriers in Alaska, District of Columbia and territories, 205.
  - common arrangement of carrier by water with carrier by rail, 211.
  - corporations incorporated in foreign countries, 260.
  - express companies, 255.
  - federal jurisdiction over water carriers, extension by Panama Canal Act of 1912, 218, 220.
  - individuals and partnerships, 260.
  - logging roads, 238.
  - original enactment, fundamental requirements, 152.
  - preliminary steps toward enactment, Cullom Committee, 149.
  - Cullom Committee's report, recommendation of bill, 150.
  - private car lines, 240.
  - sleeping car companies, 258.
- Interstate Commerce Commission, necessity of National Commission, enforcement of federal regulations, 625.
- intoxicating liquors, prohibition of sale, order of director general of railroads, 1777.
- investigation of accidents, reports, power of Commerce Commission, 663.
- knowledge of defect, evidence of defect, not element of violation of Safety Appliance Act, 1318.
- loss and damage, initial carrier's liability, carrier affected by Cummins Amendment, 563.
  - payment of claims, order of director general of railroads, 1779-1781.
- officers, authority, order of director general of railroads, 1697.
- orders, general orders of director general of railroads, federal control, 1678-1783.
- orders of Interstate Commerce Commission, boiler inspection, 1640-1688.
  - safety appliances, 1598-1632.
- prohibition from participation in elections, order of director general of railroads, 1782.
- rates, see **RATES AND CHARGES.**
- receivers of railroads subject to Employers' Liability Act, 756.

**Railroads—Continued.**

- refrigerator cars, allowances to shippers for services rendered in connection with transportation, authority of Interstate Commerce Commission, Hepburn Act, 180.
- regulations,
  - federal control, scope, historical review, effect of Interstate Commerce Act, 137.
  - authority of Congress, scope of power, 147.
  - railroads wholly within state, character of transportation, 207.
  - common arrangement for transportation with other carriers, immunity, 206.
- state and national control over interstate carriers and transportation, general principles determining, illustration, 45.
- state control,
  - appliances on interstate trains, validity of statutes requiring, 97.
  - delivery of cars for interstate shipment, state regulations superseded by Hepburn Act, 75.
  - full crews, power of state to regulate employes engaged in interstate commerce, absence of federal legislation, 98.
  - operation of trains between intrastate points, limitations and exceptions to power of state, 82.
  - rates of carriers, regulations by states in absence of federal laws upheld, 61.
  - speed of trains, signals, stopping of trains, absence of legislation by Congress, 86.
  - invalidity of statute as to speed of trains, as burdening interstate commerce, 88.
  - switch connections with private side tracks, intrastate business, 77.
  - taxes, control over interstate carriers and transportation, general principles determining, illustration, 41.
  - track connections for interchange of traffic, power of state to compel making and maintenance, 90.
- reports of accidents, see **REPORTS**.
- reports, power of Interstate Commerce Commission, monthly reports showing violation of, Hours of Service Act, 1440.
- weekly cash report, order of director general of railroads, 1750.
- route of interstate freight, duty of carriers to route as directed by shippers, amendment to Interstate Commerce Act, 193.
- running boards, carrier's duty, Safety Appliance Act, Ch. XLV, 1363-1375.
- safety appliances, see **SAFETY APPLIANCE ACT**.
  - duty to exercise ordinary care, Employers' Liability Act, 914, 927.
  - custom of other railroads not conclusive as to care exercised, 927.
  - power of Interstate Commerce Commission, 662.

**Railroads—Continued.**

safety appliances—continued.

- state control, validity of statutes requiring appliances on interstate trains, 97.
- sale of unclaimed and perishable freight, order of director general of railroads, 1771.
- shipments, privileges, order of director general of railroads, 1775.
- sill steps, carrier's duty, Safety Appliance Act, Ch. XLV, 1363-1375.
- sleeping car companies not common carriers by railroad, Employers' Liability Act, 756.
- special trains, rates, publication and filing, changes prohibited, oral contracts contravening schedules unlawful, 455.
- specific railroads affected, order for increase of wages, order of director general of railroads, 1709-1734.
- stock yards companies, interstate status, Safety Appliance Act, 1290.
- substitution for appliances unlawful, Safety Appliance Act, 1312.
- switch connection with private side tracks and lateral branch lines, power of Interstate Commerce Commission to order, Hepburn Act, 171.
- switch connections, power of Interstate Commerce Commission to order, 655.
- service at ports, imported goods, subject to Interstate Commerce Act, 297.
- text of Interstate Commerce Act, 1516.
- switches, discrimination, cars, placing or "spotting" cars for certain shippers, refusal of service to others, Interstate Commerce Act, 371.
- telegraph offices operated during day and part of night, limitations upon hours of service, 1467.
- terminal and belt railroads, subjection to Interstate Commerce Act, 234.
- interstate status, Safety Appliance Act, 1290.
- track connections for interchange of traffic, power of state to compel making and maintenance, 90.
- "transportation," private car lines as being subject to Interstate Commerce Act, 240.
- "use" of cars and "haul," distinction eliminated by 1903 Amendment, Safety Appliance Act, 1304.
- "used," extension of Safety Appliance Act to cars, etc., "used" on interstate highways, 1276.
- valuation of property of interstate carriers, duty of Interstate Commerce Commission under Act of 1913, 195.
- vessels or ships not parts of railroad systems, Employers' Liability Act, 754.
- violation of 28-Hour Live Stock Law, penalties, 1489.
- war, commodities essential to national defense, President authorized to direct movement of, 198.
- federal control during war with Germany, penalty for violation of federal statute, 132.

**Railroads—Continued.**

war, commodities essential to national defense, etc.—continued.

termination of federal control under statute, 133.

water lines, Commerce Commission may authorize railroads to continue ownership, 652.

waybills, order of director general of railroads, 1688.

Workmen's Compensation Act, state laws superseded by Employers' Liability Act, extent, 726.

**Rates and charges,**

\* allowances to shippers for services rendered, authority of Interstate Commerce Commission, Hepburn Act, 180, 653.

baggage, regulations concerning baggage to be published, 444.

cash basis, order of director general of railroads, 1706.

money only may be received for transportation by carriers, Interstate Commerce Act, 479.

promissory notes to pay freight charges, illegality, 480.

changes prohibited, text of Interstate Commerce Act, 1520.

classification of freight,

application of carload rates, goods belonging to several owners, charges to be similar, 410.

differential between carload lots and lesser amounts, legality of rates, 407.

excessive rates prohibited, 409.

differential between raw material and manufactured products, no discrimination, 405.

Commerce Commission without jurisdiction to regulate, Twenty-Eight-Hour Live Stock Law, 659.

common law, preferences between cities and localities permitted, 374.

publicity and permanency of rates at common law, 431.

damages for violation of Interstate Commerce Act,

actions for overcharges exceeding scheduled rates, prosecution in courts without determination of Commission, 494.

arbitrary sum added to sale price to cover excessive charges, right of shipper to reparation, 507, 508.

award by Commission as bar to action for additional damages, overcharges, 513.

award by commission, maximum rate need not be prescribed by Commission, 519.

excessive rates, courts without primary jurisdiction to award damages, 492.

findings of Commission as to reasonableness of rates, all persons benefited, 515.

findings of fact by Commission required, award of damages against carriers, 516.

limitations, complaints for damages, filing with Commission within two years, 523.

measure of damages, unreasonable rates and unlawful discrimination, 503.

**Rates and charges—Continued.**

damages for violation of Interstate Commerce Act—continued.

misrouting shipments, award by Commission, 513.

parties entitled to damages, excessive freight charges, consignors and consignees, 506.

past shipments with excessive rates, damages not automatically awarded, 509.

state courts, actions for damages under section eight of Interstate Commerce Act not prosecuted in state courts, 498.

discrimination in rates,

absorbing switching charges at one point and refusing at another, 388.

basing point system, legality, control of Interstate Commerce Commission, 380.

carriers not participating in rates to favored locality not guilty, 385.

cities and localities entitled to benefit of natural advantages, Interstate Commerce Act, 378.

coal fields served by different carriers, 386.

competition between localities, qualifications of rule permitting different rates based on competition, 384.

rate resulting not unreasonable, 382.

definition by Interstate Commerce Act, distinction between section two and clause in section one as to unreasonable charges, 310.  
purpose of definition, 307.

relation and distinction between section two and three, 309.

difference in amount of traffic between similar localities, discriminatory rates and fares prohibited, 384.

difference in rates based upon difference in service not discriminatory, Interstate Commerce Act, 326.

difference in rates for wholesalers and retailers prohibited, Interstate Commerce Act, 328.

different conditions affecting transportation of similar commodities, lumber and logs, no discrimination, 415.

different interstate and intrastate rates between localities, prejudice resulting, 376.

different methods of loading not justification for different rates, Interstate Commerce Act, 371.

different rates in opposite directions over same lines, no discrimination, 387.

different uses of commodities, different rates not justified, Interstate Commerce Act, 413.

differentials between Atlantic coast cities, competitors, relations between carriers, Interstate Commerce Act, 390.

differentials between cities on opposite banks of rivers crossed by expensive bridges, reasonableness of rates, 395.

group rates, establishment and maintenance by Interstate Commerce Commission, 387.

**Rates and charges—Continued.**

## discrimination in rates—continued.

- higher rates to one point than to another, injustice, 375.
- increased rates on branch lines parallel to main line permitted, 392.
- increased rates on domestic traffic, export traffic between ports of entry and inland points, Interstate Commerce Act, 331, 332.
- industries on carrier's own lines, preference against competitors on other railroads, 396.
- joint rates, abnormal division to carriers, Interstate Commerce Act, 349.
- joint rates between two localities similarly situated, prohibition by Interstate Commerce Act, 389.
- joint through rates, divisions to tap lines or logging roads, Interstate Commerce Act, 349.
- "like traffic," wheat and coarse grain, different rates, 412.
- localities entitled to non-discriminatory rates, Interstate Commerce Act, 375.
- lumber and lumber products, discrimination prohibited, 414.
- oil shipped in barrels and in tank cars, justifiable discrimination, 414.
- part of through rates lower than local rates between same points not discriminatory, 392.
- passenger tickets,
  - additional fare from passengers without tickets, collection not unlawful, 419.
  - control of Interstate Commerce Commission over mileage, excursion and commutation passenger tickets, 421.
  - regulations as to commutation tickets must not discriminate between classes of persons, 428.
  - sale of number of tickets at less than for single passenger, 422.
  - distinction between wholesale rates in passenger and freight traffic, 425.
  - limitation to particular classes of persons unlawful, 425.
  - settlers, lower rates to settlers, legality, 421.
  - transcontinental passenger fare, discrimination as affecting intermediate localities, 428.
- prohibition, Interstate Commerce Act, text, 1517.
- reasonableness of rates, presumption, illegality if another locality is prejudiced, 379.
- rebilling and reshipping grain, denial of privilege to other cities, unlawful discrimination, 393.
- reduced rates for shipments by train loads, small shippers subjected to undue disadvantage, Interstate Commerce Act, 330.
- reduced rates on returned shipments, illegality, refusal of shipment by consignee, 416.
- stopping carload shipments en route to finish loading, 397.
- transit privilege, extension over twelve months unreasonable, exceptions, Interstate Commerce Act, 357.



**Rates and charges—Continued.**

- Elkins Act, 1553.
- equality between communities under similar conditions required, Interstate Commerce Act, 374.
- extension by Interstate Commerce Commission, 1518.
- filing and publication of interstate rates, Ch. XIII, 430-483.
  - absence of joint rate over through route, separately established rates to be published, 481.
  - changes prohibited, 449.
    - defenses of estoppel and waiver not available, actions against shippers for under charges, 470.
    - oral contracts contravening schedules unlawful, 455.
    - private duties of carriers, 482.
    - thirty days' notice to Interstate Commerce Commission, 448.
    - transit and special services governed by published rules, 453.
  - collection of scheduled rates, counterclaim for damages to goods prohibited, 475.
  - collection of scheduled rates mandatory, 466.
    - illustrations, 469.
  - courts bound by published rates until set aside by Interstate Commerce Commission, 462.
  - damages for collection of rates in excess of scheduled rate by shipper, 479.
  - damages for failure to post rates not recoverable, 475, 478.
  - demurrage charges to be filed with Interstate Commerce Commission, 448.
  - Interstate Commerce Act mandatory, 437.
  - necessary steps to legality, posting not essential, 439.
  - necessity to prevent discrimination, 431.
  - penalty for making erroneous quotation of rate, damage to shipper, 473.
  - presumption of knowledge of published schedules by shippers and passengers, 460.
  - privileges furnished shippers and not specified in schedule unlawful, 444.
  - refunds prohibited, forwarders as shippers within provisions prohibiting refunds, 454.
  - schedules, essentials of schedules filed with Commission as to rates, 441.
  - through rate consisting of sum of local rates, application of rates in effect on day of shipment, 482.
  - vehicles on railroad ferries, rates for passage to be filed, 483.
- form of schedule, Commerce Commission may prescribe, 653.
- free transportation of destitute persons, reduced rates for transportation of poor persons, disabled soldiers, etc., Amendment of 1889 to Interstate Commerce Act, 161.

**Rates and charges—Continued.**

- general orders of director general of railroads, federal control, 1679.
- increase, order of director general of railroads, 1735-1748.
- Interstate Commerce Act,
  - Amendment of 1889, mandamus rendered available to shippers, 159.
  - amendments and additions to statute by Mann-Elkins Act, 187.
  - cause for enactment, decision limiting state's power of regulation to intrastate commerce, 146.
  - inadequacy of common law remedies, 141.
  - regulation of rates, futile attempts of states, 145.
  - construction and interpretation, 155.
  - extension of power of Interstate Commerce Commission and scope of act, by Hepburn Act, 166.
  - Interstate Commerce Commission not authorized to prescribe rates under original act, 156.
  - penalties for violation of act, Amendment of 1889, 160.
  - purpose of original enactment, reasonableness of rates, prevention of discrimination, 154.
- interstate transportation, all stages of shipment, regulation of terminal charges, services and facilities, 283.
- long and short haul provision, amendment to Interstate Commerce Act, 191.
  - reduced rates for longer than for shorter distance, Commission may authorize, 651.
- loss and damage, initial carrier's liability, limitation of liability, validity as to property other than live stock, Cummins Amendments, 567.
- maximum rates to and from ports, establishment by Commerce Commission, 659.
- power of Interstate Commerce Commission to prescribe, 638.
  - through routes and joint rates, 176.
- prohibition of filing increases without approval of Commission, 642.
- prohibition of rebates and discrimination, amendment to Interstate Commerce Act, Elkins Act of 1903, 164.
- publication of rates, see ante this title, FILING AND PUBLICATION.
- reasonableness, text of Interstate Commerce Act, 1514.
- rebates, Interstate Commerce Act, causes leading to enactment of original act, 139.
- reduced rates for longer than for shorter distance, Commission may authorize, 651.
- reduction to meet water competition, increase subject to approval of Commission, 658.
- regulations of Congress, intrastate subject matters, valid regulations, 54.
- services rendered by shippers, control of Commerce Commission, 653.

**Rates and charges—Continued.**

- state control,
  - intrastate transportation, power to fix, 71.
  - regulations by states in absence of federal laws held invalid, 64.
  - regulations by states in absence of federal laws upheld, 61.
  - state statutes superseded by rates under Interstate Commerce Act, validity of rates as to intrastate shipments, 78.
- suspension of advance by Interstate Commerce Commission, investigation, 639.
- power of Interstate Commerce Commission, amendment to act, 190.
- suspension of tariff schedules, form of application, Interstate Commerce Commission, 675.
- suspension, text of Interstate Commerce Act, 1530.
- telegraph companies, state laws superseded by federal control under Interstate Commerce Act, 248.
- text of Interstate Commerce Act, 1522.
- through routes and joint rates, authority of Commerce Commission to prescribe, 176, 646.
- rail and water lines, 648.
- statute compelling establishment by carriers, validity, 644.
- transportation to foreign countries, 649.
- tickets, increase of fares, order of director general of railroads, 1740.
- transportation by water, power of state to establish rates, absence of federal legislation, 94.
- transportation from United States to adjacent foreign countries, carriers subject to Interstate Commerce Act, 210.
- war, federal control and compensation of carriers during war with Germany, purpose of enactment, 115.
- rates for transportation, authority of President to fix, 128.
- weighing of shipments of freight, federal control under Interstate Commerce Act, 290.

**Real estate,**

- valuation of property of interstate carriers, duty of Interstate Commerce Commission, under Act of 1913, 195.

**Rebate,**

- see DISCRIMINATION.

**Receivers,**

- Ash Pan Act, receivers as "common carriers," 1503.
- subjection to Employers' Liability Act, 756.
- subjection to Interstate Commerce Act, 259.
- text of statute, 1539.

**Records,**

- control of Commerce Commission, 656.

**Records—Continued.**

- interstate commerce, method of proving engagement in, Employers' Liability Act, 1221.
- orders of Interstate Commerce Commission, 1220.

**Refrigerator cars,**

- common carriers, private car lines, subjection to Interstate Commerce Act, 240.
- elements of interstate transportation, refrigeration and ventilation of cars, 291.
- special preparation of freight cars for shipment, duties of shippers, 287.
- employees engaged in interstate commerce, material and supplies, procuring for interstate trains, Employers' Liability Act, 894.
- switching crews, cars to be loaded with interstate freight, Employers' Liability Act, 881.
- "transportation," definition of term as used in Interstate Commerce Act, 300.

**Rehearing,**

- Interstate Commerce Commission, text of statute, 1534.
- petition, approved form, 1587.
- rules of Commission, 1583.

**Release,**

- compensation of carriers, money only may be received for transportation, Interstate Commerce Act, 479.
- contracts, prohibition of Employers' Liability Act, limitation of statute to employees of carrier, 1134.
- release not a contract within statute, 1135.

**Relief,**

- Hours of Service Act, duty to substitute crews, prevention of excessive hours, 1454.
- when statute is not applicable, 1471.

**Remedies,**

- see ACTIONS.
- procedure before Interstate Commerce Commission, Ch. XX, 664-686.

**Removal of causes,**

- actions in state courts not removable to Federal courts, Employers' Liability Act, 1148.
- loss and damage to interstate shipments, initial carrier's liability, Carmack Amendment, removal of actions in state courts, 549.
- petition not stating cause of action under Employers' Liability Act although so intended, 1152.
- petition stating cause of action under state and federal statutes, Employers' Liability Act, 1149, 1150.

**Removal of causes—Continued.**

verdicts, number of jurors, state laws permitting verdict by less than twelve, validity in actions under Employers' Liability Act, 1236.

**Repairs,**

air brakes, duty to repair absolute, Safety Appliance Act, 1338.

appliances, duties imposed by Safety Appliance Act, appliances must be operative, 1324.

assumption of risk, ordinary, known and obvious risks assumed, exceptions, promise to repair, Employers' Liability Act, 992.

automatic couplers, instructions as to violation of statute, Safety Appliance Act, 1361.

burden of proof upon carrier, movement of cars for repairs, Safety Appliance Act, 1391.

cars, application of Safety Appliance Act, 1316, 1318.

defective cars containing live stock or perishable freight, moving with chains, 1397.

defective cars, movement, law prior to amendment of Safety Appliance Act, 1398.

exception from requirements of Safety Appliance Act, 1385.

cars on interurban railroads moving over street railroads, no exemption, 1397.

"necessary movements" for repairs, 1386.

strict construction of exceptions, 1396.

interstate commerce, car on switching track for repairs, Safety Appliance Act, 1302.

interstate employes, Employers' Liability Act, carpenters, 814.

drainage, excavating ditches, 834.

erroneous decisions holding employment to be intrastate, 803.

method of proving engagement in interstate commerce, 1223.

removing bolts from timbers taken from interstate bridges, 819.

repair and machine shops, roundhouses and other buildings, 836, 840.

repair of cars and engines, 841.

temporary delay, 842.

repair of cars by shopmen in terminal yards, 843, 845, 847.

repair of cars, employment not interstate, 847.

repair of engines in roundhouses, 843, 845, 847.

repairing side tracks, spurs and switches, 823.

survey of track to improve road, 826.

switching crews, cars loaded with lumber for repair and construction work, 890.

switching crews, illustrations, 891.

movement for repairs, relief from penalty, liability for personal injuries not affected, Safety Appliance Act, 1396.

movement from repair point prohibited, Safety Appliance Act, 1389, 1390.

**Repairs—Continued.**

necessity of movement for repairs as question of fact, Safety Appliance Act, 1398.  
repair of cars at time of discovery of defect, necessity, Safety Appliance Act, 1388.  
reports, filing sworn reports of carriers, Boiler Inspection Act, 1499.  
tracks, "used," extension of Safety Appliance Act to cars, etc., "used" on interstate highways, 1276.  
"use" of cars and "haul," distinction eliminated by 1903 Amendment, Safety Appliance Act, 1304.

**Reports,**

accidents,

damage suits, reports not to be used, Boiler Inspection Act, 1498.

Accident Reports Act, 1505.

duties of carriers under Accident Reports Act, 1506.

Federal Accident Reports Act, Ch. LV, 1504-1506.

filing by carriers, Boiler Inspection Act, 1497.

investigation, power of Commerce Commission, 663.

Accident Reports Act, 1505.

order of director general of railroads, 1685.

orders of Interstate Commerce Commission, boiler inspection, 1648, 1665.

publication by Interstate Commerce Commission, Boiler Inspection Act, 1498.

text of federal statute, 1672.

accounts, records and memoranda of interstate carriers under jurisdiction of Interstate Commerce Commission, Hepburn Act, 185.

annual report by Chief Inspector to Interstate Commerce Commission, Boiler Inspection Act, 1499.

annual reports by carriers, Commerce Commission may require, 661.

annual reports by Commerce Commission required, 660.

boiler inspection, orders of Interstate Commerce Commission, 1647, 1665.

text of statute, 1638.

carriers, text of Interstate Commerce Act, 1539.

filing, sworn reports of carriers, Boiler Inspection Act, 1499.

"foreign commerce," definition, Accident Reports Act, 1504.

Hours of Service Act, power of Interstate Commerce Commission, monthly reports showing violation of statute, 1440.

Interstate Commerce Commission, members, authority to divide members into divisions, 631.

publication of reports of Commission, employment of assistants, Amendment of 1889, 161.

text of statute, 1528.

**Reports—Continued.**

"interstate commerce," definition, Accident Reports Act, 1504.  
monthly reports by carriers to Commerce Commission required, 661.  
orders of Interstate Commerce Commission, boiler inspection, 1665.  
penalty, failure to make report within thirty days after end of each month, Accident Reports Act, 1505.  
schedules, contracts and annual reports, filing with Commission, public records as prima facie evidence, 680.  
valuation of carriers, text of Interstate Commerce Act, 1536.  
weekly cash report, order of director general of railroads, 1705.

**Res adjudicata,**

see FORMER ADJUDICATION.

**Rest,**

Hours of Service Act, continuity, breaking of, relief from duty for definite period, 1453.

**Rivers,**

rates, discrimination, basing point system, legality, control of Interstate Commerce Commission, 380.  
municipalities on opposite banks of rivers, see RATES AND CHARGES.

**Rivets,**

boiler inspection, orders of Interstate Commerce Commission, 1642.

**Roundhouses,**

interstate employes, Employers' Liability Act, 836, 840.  
going to and from work, employes on premises, 784.  
repair of buildings not interstate commerce, 835.  
repair of engines in roundhouses, 843, 845, 847.  
employment not interstate, 847.  
repairing turntables, 824.  
trainmen, beginning and end of federal control, 863.

**Rules,**

see ORDERS.

answers, rules of Commerce Commission, 676.  
Boiler Inspection Act, rules and regulations, adoption and enforcement, 1495.  
rules controlled by Commerce Commission, 660.  
violation of statute, penalties, 1498.  
contracts, prohibition of Employers' Liability Act, limitation of statute to employes of carriers, 1134.  
statutory provisions, 1131.  
validity, 1132.  
explosives, transportation, text of federal statute, 1676.

**Rules—Continued.**

headlights, state laws superseded by Boiler Inspection Act as amended, 1500.  
 judicial notice, orders of Interstate Commerce Commission, action under Safety Appliance Act, 1422.  
 prohibiting going between moving cars, effect, Safety Appliance Act, 1408.  
 rules of procedure, power of Commerce Commission to formulate, 671.

**Running boards,**

carrier's duty, Safety Appliance Act, Ch. XI.V, 1363-1375.  
 duty to furnish mandatory, 1368.  
 extent of requirement of act, 1372.  
 illustrations, violation of act, 1372.  
 Interstate Commerce Commission, purpose of Congress in authorizing Commission to prescribe standard equipment, 1375.  
 maintenance as well as equipment, 1368, 1371.  
 necessity, 1365.  
     effect of order of Interstate Commerce Commission, 1373.  
     foreign and domestic cars, no distinction, 1367.  
 orders of Interstate Commerce Commission, 1600.

**S.****Safety Appliance Act,**

action for penalties, procedure controlled by state rules, 1419.  
 actions for personal injuries, enforcement in state courts, 1416.  
     interstate employment not alleged, submission of case not error, 1421.  
     petition need not refer to statute, 1420.  
     plaintiff not required to negative proviso, 1420.  
     pleading use of car in interstate commerce, 1421.  
     similarity to actions for penalties, 1313.  
     violation in different relation not actionable, 1318.  
 agitation for safety appliances on all cars, 1260.  
 air brakes,  
     duty to repair absolute, 1338.  
     failure to equip with, contributory negligence as defense, 1409.  
     former and present requirements, 1328.  
     movements between yards as distinguished from movements in yards, transfer trains, 1331.  
     necessity, interurban electric trains, 1332.  
     necessity of operation, hand brakes prohibited, 1334.  
     order of Commerce Commission increasing percentage of cars to be equipped with air brakes, 1258.  
     recovery for injury caused by collision, failure of brakes to work, 1333.  
     statute not applicable to switching, 1329.  
     statutory requirements, Ch. XLIII, 1328-1338.  
     "trains" within statute, what constitutes, 1330.



**Safety Appliance Act—Continued.**

- amendments, necessity, connecting steam hose not part of coupling, 1353.
- Amendments of 1903, summary, 1259.
- application of statute to all cars, 1351.
  - application of statute to coupling as well as uncoupling, 1352.
  - common law rule, carrier's liability, 1252.
  - defect as offense, use of coupler not necessary, 1360.
  - defect as proximate cause of injury, 1361.
  - defects, 1341.
    - failure of pin lifter to open knuckles, 1360.
  - different patterns of couplers, effect, 1350.
  - employees between cars for other purposes, proximate cause of injury, 1348.
  - employees entitled to protection of statute, proximate cause of injury, 1345.
  - futility of state legislation requiring automatic couplers, 1251.
  - injury to employees on duty, violation of statute not actionable, 1347.
  - instructions as to violation of statute, 1361.
  - lever on other side of car, availability of lever, no defense, 1358.
  - necessity at both ends of cars, 1354, 1355.
  - necessity, engine and tender, coupler not required, 1360.
  - object of Congress in requiring, 1340.
  - preparation for coupling, regulation, 1357.
  - provision of act, 1340.
  - statutory requirements, Ch. XLIV, 1339-1362.
    - steam hose not part of coupling, 1353.
  - switching, necessity of couplers, 1351.
  - trainmen on top of cars protected, 1346.
  - trolley cars, couplers not required, 1356.
  - violation of statute, failure of coupler to work under all circumstances as violation, 1343.
- assignment, duties imposed by statute not assignable, 1325.
- assumption of risk, Ch. XLVIII, 1400-1415.
  - defense not available, violation of act, action under Employers' Liability Act, 1008.
  - distinction from contributory negligence, 1403.
  - no defense, violation of act, 1400.
  - two distinct acts of negligence, right to instructions, 1402.
- automatic couplers,
  - actions for injuries, exhibition of model couplers, 1362.
- belt lines, interstate status, 1290.
- Boiler Inspection Act, duty created, nature, 1496.
  - extension of statute, Amendment of 1915, 1499.
- brakes, see title BRAKES.
  - common law rule, carrier's liability, 1252.
- burden of proof, penalties, action for recovery, 1426.

**Safety Appliance Act—Continued.**

- carriers, requirements as to interstate character prior to 1903 Amendment, 1286.
- cars and vehicles subject to statute, 1280.
  - exemption from act, cars not subject to state laws, 1398.
  - hauling cars with defective appliances over other railroads, penalty, 1282.
  - interstate character, cars hauled in interstate trains, 1299.
    - car on switching track for repairs, 1302.
    - dining car used for interstate train on siding, 1303.
    - hauling empty cars over state lines, 1301.
    - requirement as to interstate character, not necessary since 1903 Amendment, 1287.
    - requirement as to interstate character prior to 1903 Amendment, 1286.
    - use in interstate traffic, materiality, Employers' Liability Act, 1288.
  - intrastate and interstate cars, inclusion by Safety Appliance Act, as amended, 1270.
  - intrastate cars, relation to interstate commerce, 1274.
    - use on tracks other than main lines, 1277.
    - validity of amendment including, 1273.
  - liability of railroad for condition of foreign cars, 1325.
  - no distinction between passenger and freight cars, 1277.
- causes of enactment of original Safety Appliance Act, 1253.
- common carriers, application of act to railroads which are common carriers, 1285.
- compliance with, order of director general of railroads, 1685.
- construction of act, 1266.
  - custom of railroad, effect in construing, 1267.
  - federal decisions controlling, 1267.
  - rules as to criminal statutes not applicable, 1266.
- contracts, duties imposed by statutes cannot be evaded by contract, 1323.
- contributory negligence, Ch. XLVIII, 1400-1415.
  - application of state statutes abolishing defense, 1407.
  - choosing dangerous way to uncouple cars, instructions held erroneous, 1412.
  - defense prior to enactment of Employers' Liability Act, 1404.
  - distinction from assumption of risk, 1403.
  - effect of Employers' Liability Act, defense abolished, 1406.
  - employee engaged in intrastate commerce, 1406.
  - matter of law, choosing dangerous way to uncouple cars, safe method available, 1409.
    - going between cars to uncouple, employee held not negligent, 1414.
  - no air brakes on logging trains, 1409.
  - question of fact, 1414.

**Safety Appliance Act—Continued.**

- defective cars, containing live stock or perishable freight, moving with chains, 1397.
- movement, law prior to amendment, 1398.
- right of carrier to refuse defective cars supplied by connecting lines, 1326.
- defects, care and diligence in discovering and repairing no defense to action, 1319.
- employees' act causing appliance to become defective no defense, 1325.
- defects of original act, difficulty in enforcement, 1257.
- distinction from Employers' Liability Act, intrastate commerce, 1268.
- District of Columbia, application of act, 1269.
- drawbars, Ch. XLVI, 1376-1384.
- height, decisions as to requirements of law, 1378.
- delegation of authority as to height, validity, 1280.
- duty not to be delegated or evaded, 1382.
- instructions erroneous under old and new orders of Interstate Commerce Commission, 1379.
- instructions erroneous under old order of Interstate Commerce Commission, correctness under new order, 1379.
- orders of Interstate Commerce Commission, 1257, 1261, 1376, 1377.
- necessity, application of act to locomotives, 1380.
- repair of cars, right to move in revenue trains or with other cars, Safety Appliance Act, 1391.
- Employers' Liability Act, remedies, limitation to employees of railroads, 729.
- employees engaged in interstate commerce under Employers' Liability Act, application of decisions construing Safety Appliance Act, 800.
- employees of interstate carriers, federal and state control, hours of service, 1432.
- exception from statute, cars and movements of cars, Ch. XLVII, 1385-1389.
- cars on interurban railroads moving over street railroads, no exemption, 1397.
- statutory provision, 1385.
- strict construction of exceptions, 1396.
- excuse, inconvenience and impracticability not excuse for violation of act, 1323.
- grab irons,
  - certain grab irons required, 1365.
  - necessity, foreign and domestic cars, no distinction, 1367.
  - provision of act, extension, 1364.
  - use for other purposes than coupling, protection of act, 1366.
- hand brakes,
  - application of act, switching, 1372.
  - duty of carriers, maintenance as well as equipment, necessity, 1368, 1371.

**Safety Appliance Act—Continued.**

hand brakes—continued.

duty to furnish mandatory, 1368.

Interstate Commerce Commission, purpose of Congress in authorizing Commission to prescribe standard equipment, 1375.

necessity, 1365.

effect of order of Interstate Commerce Commission, 1373.

foreign and domestic cars, no distinction, 1367.

handholds,

duty to furnish mandatory, 1368.

extent of requirement of act, 1372.

Interstate Commerce Commission, purpose of Congress in authorizing Commission to prescribe standard equipment, 1375.

necessity, effect of order of Interstate Commerce Commission, 1373.

foreign and domestic cars, no distinction, 1367.

requirement of original act, 1363.

substitutes unlawful, 1367.

historical review of original statute, amendments and orders, Ch. XXXIX, 1251-1263.

interstate commerce,

carriers engaged in, cars used in, Ch. XLI, 1283-1305.

cars hauled in interstate trains, 1299.

cars on switching track for repairs, 1302.

dining car used for interstate train on siding, 1303.

hauling empty cars over state lines, 1301.

industrial railroads engaged in, 1298.

interurban electric railroads engaged in, 1296.

passing through another state to point in same state, 1298.

preparation, switching cars in yards, 1300.

railroads in one state transporting freight, continuous shipment without traffic agreement with other carriers, 1293, 1294.

re-billing not controlling in determining character of shipment, 1301.

transferring cars to industrial track, 1305.

transportation for express companies, 1304.

transportation of company property over state lines, 1304.

what constitutes, 1284.

Interstate Commerce Commission,

authority to standardize appliances, Amendments of 1910, 1269. orders, 1598-1632.

purpose of Congress in authorizing Commission to prescribe standard equipment, 1375.

standardization order as to appliances, 1262.

judicial notice, orders of Interstate Commerce Commission, 1422.

knowledge of defect not required, 1371.

evidence of defect not element of violation of statute, 1318.

suit not barred, 1402.

**Safety Appliance Act—Continued.**

- ladders, extent of requirement of act, 1372.
- Interstate Commerce Commission, purpose of Congress in authorizing Commission to prescribe standard equipment, 1375.
- necessity, 1365.
- liability, basis, nature and extent, Ch. XLII, 1306-1327.
- limitation of actions, amendments stating new cause of action, prohibition, 1423.
- provision of Employers' Liability Act, controlling effect, 1422.
- state statute, effect in absence of interstate employment, 1423.
- maintenance as well as equipment, necessity, 1363, 1371.
- appliances must be operative, 1324.
- duty to maintain appliances in secure condition, absolute duty imposed, 1309.
- "necessary movement" for repairs, exception from Safety Appliance Act, 1386.
- negligence, duty imposed by act, violation causing injury as authorizing recovery under Employers' Liability Act, 921.
- evidence held not to show actionable negligence, Employers' Liability Act, 973.
- evidence of negligence not required, violation of statute, 1320.
- violation of statute as negligence per se, 1306.
- operation of appliances, employee's failure to operate appliance no offense, 1324.
- orders of Interstate Commerce Commission, 1598-1632.
- judicial notice, 1422.
- necessity for appliances not affected by order, 1373.
- penalties, actions for, Ch. L, 1425-1427.
- burden of proof, 1426.
- recovery not criminal action, 1425.
- remedy for recovery, 1425.
- violation of statute, liability for each car hauled, 1425.
- pleading and practice, actions for personal injuries, Ch. XLIX, 1416-1424.
- Porto Rico, applicability of act, 1281.
- "preponderance of evidence," definition, actions for penalties, 1427.
- provisions of original act, summary, 1255.
- proximate cause, defective equipment must be proximate cause, action for damages, 1326.
- question not ordinarily for jury, 1327.
- recovery prohibited when employee's negligence is sole cause of injury, 1322.
- purpose of Congress in enacting act, 1265.
- railroads, limitation of Employers' Liability Act to railroads, bridges, ferries and tracks included, 739.
- remedial provisions not limited to employees, 1269.

**Safety Appliance Act—Continued.**

- repair of cars,
  - application of remedial features of statute, 1316, 1318.
  - burden of proof upon carrier, movement of cars for repairs, 1391.
  - movement for repairs, relief from penalty, liability for personal injuries not affected, 1396.
  - movement from repair point prohibited, 1389, 1390.
  - necessity of movement for repairs as question of fact, 1398.
  - right to move in revenue trains or with other cars, 1391.
  - time, repair at time of discovery of defect, necessity, 1388.
- rule prohibiting going between moving cars, effect, 1408.
- running boards, duty of carriers, maintenance as well as equipment, necessity, 1368, 1371.
- duty to furnish mandatory, 1368.
- extent of requirement of act, 1372.
- illustrations, violation of act, 1372.
- Interstate Commerce Commission, purpose of Congress in authorizing Commission to prescribe standard equipment, 1375.
- necessity, 1365.
  - effect of order of Interstate Commerce Commission, 1373.
  - foreign and domestic cars no distinction, 1367.
- scope, validity and construction of Safety Appliance Act, Ch. XL, 1264-1282.
- sill steps, duty to furnish mandatory, 1368.
  - extent of requirement of act, 1372.
  - Interstate Commerce Commission, purpose of Congress in authorizing Commission to prescribe standard equipment, 1375.
  - necessity, 1365.
    - effect of order of Interstate Commerce Commission, 1373.
    - foreign and domestic cars, no distinction, 1367.
- state control, appliances on interstate trains, regulation of heating and operation, validity of state laws, 97.
- state laws, invalidity as to cars of interstate railroads, 1278.
  - punishment of crime against two sovereignties, rule not applicable, 1279.
- stock yard companies, interstate status, 1290.
- substitution for appliances unlawful, 1312.
- terminal railroads, interstate status, 1290.
- territories, application of act, 1269.
- text of statute as amended, 1593-1597.
- "use" of cars and "haul," distinction eliminated by 1903 Amendment, 1304.
- "used," extension of act to cars, etc., "used" on interstate highways, 1276.
- validity of original act, 1264.
- verdicts, number of jurors, state laws permitting verdict by less than twelve, validity in actions under Employers' Liability Act, 1236.

**Safety Appliance Act—Continued.**

- violation of act,
  - contributory negligence, damages not reduced, action under Employers' Liability Act, 1048.
- death, damages recoverable under Employers' Liability Act, compensatory damages, measure, 1073.
- evidence of negligence not required, 1320.
- negligence per se, 1306.
- petition under Federal Employers' Liability Act, necessity of showing injury or death under conditions described in statute, 1179.

**Sales,**

- freight unclaimed and perishable, order of director general of railroads, 1771.
- imports from foreign states, immunity from state legislation, protection of commerce clause, 19.
- "interstate commerce" defined, 10.
- interstate transportation, change of destination in transit, 270.
  - coal, delivery F. O. B. at mine for transportation to purchaser outside of state, 279.
  - peddling from cars, carriers not compelled to furnish peddling service, 299.
  - transportation from one state to another as element, 10, 13.
- intoxicating liquors, prohibition of sale, order of director general of railroads, 1777.
- licenses, immunity from state legislation, commencement and termination of protection of commerce clause, original packages, 22.
- "original package" defined, protection of Interstate Commerce Clause, 24.
- purchasers of property of common carriers, subjection to Interstate Commerce Act, 259.
- state control over internal affairs, invalidity of federal laws and regulations encroaching upon state's power, 48.

**Schedules,**

- baggage, regulations concerning baggage to be published, 444.
- rates,
  - essentials of schedules, 441.
  - form of schedule, Commerce Commission may prescribe, 653.
  - publication and filing, changes prohibited, 449.
  - oral contracts contravening schedules unlawful, 455.
  - rules of Commerce Commission as to suspension, 1584.
  - suspension of tariff schedules, form of application, 675.
- text of Interstate Commerce Act, 1519.

**Schools,**

- pupils, regulations as to commutation tickets must not discriminate between classes of persons, 428.

**Sectionman injured or killed,****Employers' Liability Act,**

- assumption of risk, distinction from contributory negligence, 1006.
- employees held not to have assumed risk, 1026.
- instruction applicable to evidence, necessity of giving, 1015.
- engagement in interstate commerce, going to and from work, employees on premises, 784.
- method of proving engagement in, 1223.
- rails, removing old rails and storing new ones, 828.
- repairing side tracks, spurs and switches, 823.
- repairing tracks, 821.
- termination of work, sleeping in cars, 792.
- ties, laborers handling ties, 831.
- evidence held not to show actionable negligence, 971, 973.
- evidence held to show actionable negligence, 962.
- injury caused by servant acting within scope of employment, necessity, 936.

**Set-off and counterclaim,**

- contracts, prohibition of Employers' Liability Act, statutory provisions, 1131.
- rates, publication and filing, collection of scheduled rates, counterclaim for damages to goods prohibited, 475.

**Settlement,**

- see COMPROMISE AND SETTLEMENT.

**Sheep,**

- see ANIMALS.

**Shovel-cars,**

- see CARS.

**Signals,**

- orders of Interstate Commerce Commission, boiler inspection, 1655.

**Sill steps,**

- carrier's duty, Safety Appliance Act, Ch. XLV, 1363-1375.
- duty to furnish mandatory, 1368.
- extent of requirement of act, 1372.
- Interstate Commerce Commission, purpose of Congress in authorizing Commission to prescribe standard equipment, 1375.
- necessity, 1365.
- effect of order of Interstate Commerce Commission, 1373.
- foreign and domestic cars, no distinction, 1367.
- order of Interstate Commerce Commission, 1601.



**Sleep,**

- employees engaged in interstate commerce, trainmen, beginning and end of federal control, Employers' Liability Act, 863.
- termination of work, sleeping in cars, 792.
- hours of service, breaking of continuity, brief periods off duty, 1450.

**Sleeping car companies,**

- Employers' Liability Act,
  - contracts, prohibition of act, 1134.
  - employees engaged in interstate commerce, Pullman employees, 903.
  - sleeping car companies not included, 756.
- Interstate Commerce Act,
  - act not applicable to all interstate commerce, 300.
  - subjection to Hepburn Amendment, 258.
  - statutory provision, 201.

**Soap,**

- classification of freight, preferences, distinction between property, competition, 403.

**Soldiers,**

- free transportation, Amendment of 1889 to Interstate Commerce Act, 161.
- prohibition of giving of passes by Hepburn Act, exceptions, 181.
- text of Interstate Commerce Act, 1515.

**Stage-coach,**

- Interstate Commerce Act not applicable to all interstate commerce, 300.

**States,**

- Employers' Liability Act, jurisdiction of state and federal courts, Ch. XXXIV, 1145-1169.
- employees of interstate carriers, federal and state control, hours of service, 1432.
- interstate commerce, see INTERSTATE COMMERCE; INTRASTATE COMMERCE.
- intoxicating liquors, regulation of shipment by states, federal statutory exceptions establishing power, 30.
- regulation of carriers,
  - all carriers in Alaska, District of Columbia and territories subject to Interstate Commerce Act, 205.
  - common arrangement by ferry company with carrier by rail, subjection to Interstate Commerce Act, 214.
  - express companies, regulation by states or municipalities invalid, interstate commerce, 106.

**States—Continued.**

## regulation of carriers—continued.

federal control, railroads wholly within state, common arrangement for transportation with other carriers, 206.

headlights, state laws superseded by Boiler Inspection Act as amended, 1500.

imports from foreign states, immunity from state legislation, protection of commerce clause, 16.

invalidity of federal laws and regulations encroaching upon state's power, 48.

loss and damage to property carried, state laws superseded by Carmack Amendment to Interstate Commerce Act, 79.

operation of trains between intrastate points, limitations and exceptions to power of state, 82.

payment for transportation by advertising, invalidity of state statute, 81.

rates of carriers, regulations in absence of federal laws held invalid, 64.

regulations in absence of federal laws upheld, 61.

rates specified in bill of lading, state statutes superseded by rates under Interstate Commerce Act, validity of rates as to intrastate shipment, 78.

regulations of Congress, intrastate subject matters, valid regulations, 54.

safety appliances, invalidity as to cars of interstate railroads, 1278.

speed of trains, signals, stopping of trains, absence of legislation by Congress, 86.

state and national government, respective powers, Ch. II, 35-107.

general principles determining, 37, 41.

switch connections with private side tracks, power of state to compel, intrastate business, 77.

Safety Appliance Act, distinction from Employers' Liability Act, intrastate commerce, 1268.

punishment of crime against two sovereignties, rule not applicable, 1279.

war, control of carriers, Ch. III, 108-133.

**Station agent,**

employees engaged in interstate commerce, mail, handling, Employers' Liability Act, 904.

**Statutes,**

appeal, federal question, pleading federal act and submitting case under state law, federal right not denied, Employers' Liability Act, 1165.

pleading of federal act, statute requiring, no denial of federal right, Employers' Liability Act, 1167.

Ash Pan Act, Ch. LIV, 1502-1503.

**Statutes—Continued.**

- assumption of risk under Employers' Liability Act, Ch. XXVIII, 978-1027.
- abolition or modification by state constitution and statutes, effect, 984.
- risks assumed, violation of state statutes not included, 1011.
- Bill of Lading Act, Ch. XVIII, 609-623.
  - origin and scope, 609.
- Boiler Inspection Act, extension of statute, Amendment of 1915, 1499.
- car couplers, futility of state legislation requiring automatic couplers, 1251.
- compensation of agents employed to affect legislation, prohibition, order of director general of railroads, 1682.
- construction, exceptions, strict construction of exceptions, Safety Appliance Act, 1396.
  - exception to Hours of Service Act, burden of proving upon carrier, 1486.
    - carrier must exercise high degree of diligence, 1475.
  - loss and damage to interstate shipments, initial carrier's liability, Carmack Amendment, federal decisions, controlling effect in construing statute, 547.
  - negligence, violation of Safety Appliance Act, evidence of negligence not required, 1320.
- Safety Appliance Act, 1266.
  - custom of railroad, effect in construing, 1267.
  - federal decisions controlling, 1267.
  - repair of cars, right to move in revenue trains or with other cars, 1391.
    - rules as to criminal statutes not applicable, 1266.
- contributory negligence, application of state statutes abolishing defense, action under Safety Appliance Act, 1407.
- damages, apportionment under Employers' Liability Act, difference from Georgia Statute, 1038.
  - modification by Employers' Liability Act, purpose of Congress, 1034.
  - pleading, necessity, determination by state law, Employers' Liability Act, 1050.
- death, damages recoverable under Employers' Liability Act, pecuniary loss, applicability of state statute entitling father to earnings of children, 1126.
  - state statutes limiting amount recoverable not applicable, 1124.
- district inspectors, duties, enforcement of Boiler Inspection Act, 1494.
- drawbars, statutory requirements, Safety Appliance Act, Ch. XLVI, 1376-1384.
- election, cause of action under state law and Employers' Liability Act, motions to elect under Iowa statute, 1229.
  - time of sustaining motion to elect, 1227.

**Statutes—Continued.**

- Employers' Liability Act,  
beneficiaries, Ch. XXX, 1053-1060.  
carriers subject to, Ch. XXII, 738-773.  
construction, decisions of federal courts, controlling effect, 731.  
contracts prohibited by, Ch. XXXII, 1131-1136.  
    application to existing and future contracts, 1133.  
contributory negligence under, Ch. XXIX, 1028-1052.  
limitation provisions, Ch. XXXIII, 1137-1144.  
negligence under, Ch. XXVII, 911-977.  
purpose of Amendment of 1910, 715.  
scope, validity and effect, Ch. XXI, 689-737.
- Hours of Service Act,  
construction of statute, remedial statute to be liberally construed,  
    1443.  
excuses and exceptions, 1470-1486.  
limitations upon hours of service, 1447-1470.  
purpose, scope and validity of statute, Chapter LI, 1431-1446.  
telegraph offices, two offices in one community as one "place," 1469.  
validity, statute not void for uncertainty, 1439.
- Interstate Commerce Act, amendments, chronological review, Ch. V,  
    158-199.  
construction and interpretation, 155.
- Interstate Commerce Commission, necessity of national Commission,  
enforcement of federal regulations, 625.
- Safety Appliance Act, see SAFETY APPLIANCE ACT.  
causes of enactment, 1253.  
distinction from Employers' Liability Act, intrastate commerce,  
    1268.  
provisions of original act, summary, 1255.  
purpose, scope, validity and construction, Ch. XL, 1264-1282.  
violation of statute, excuse, inconvenience and impracticability not  
    excuse, 1323.
- Twenty-Eight-Hour Live Stock Law, Ch. LII, 1487-1490.  
excuse from complying with, accident, 1488.  
violation of statutes, contributory negligence, damages not reduced,  
    action under Employers' Liability Act, 1048.  
provision of Employers' Liability Act, 1028.
- Workmen's Compensation Act, state laws superseded by Employers'  
Liability Act, extent, 726.

**Stipulations,**

- hearing before Commerce Commission, 679.

**Stock yards,**

- stock yard companies, interstate status, Safety Appliance Act, 1290.  
terminal and belt railroads, subjection to Interstate Commerce Act,  
    234,

**Stock yards—Continued.**

transfer of live stock between pens and tracks of trunk lines, subjection to Interstate Commerce Act, 236.

**Storage houses,**

Interstate Commerce Commission, extension of power of Commission and scope of Interstate Commerce Act, by Hepburn Act, 166.

**Storm,**

Hours of Service Act, statute not applicable, definition of "casualty," "unavoidable accident," and "act of God," 1473.

**Street railroads,**

Adamson Eight-Hour Wage Law, railroads and employes excepted, 1507.

automatic couplers not required, Safety Appliance Act, 1356.

bridge companies subject to Interstate Commerce Act, 226.

electric interurban railroads, subjection to Interstate Commerce Act, 233.

Employers' Liability Act, street railroad not included, 755.

application to interurban electric railroads, 752.

franchises, conditions of acceptance, municipal ordinances, regulation of carriers as to passenger rates, invalidity, 67.

licenses, immunity from state legislation, protection of commerce clause, 20.

"railroad," street railroads as being subject to Interstate Commerce Act, crossing state line, 230.

rates, authority of Interstate Commerce Commission to prescribe through routes and joint rates, 176, 646.

Safety Appliance Act, exception from requirements of, 1385.

cars on interurban railroads moving over street railroads, no exemption, 1397.

strict construction of exceptions, 1396.

ventilation, state and national control over interstate carriers and transportation, general principles determining, illustration, 45.

war, President's assumption of control of railroads, proclamation of 1916, 109.

**Subpoena,**

see WITNESS.

**Sugar,**

rate for transportation, increase, order of director general of railroads, 1738, 1746.

**Sunday,**

regulations of trains, prohibition of operation on Sunday, validity of regulation, 98.

**Survey,**

employes engaged in interstate commerce, survey of track to improve road, Employers' Liability Act, 826.

**Swine,**

see ANIMALS.

**Switching cars,**

- air brakes, Safety Appliance Act not applicable to switching, 1329.
- "trains" within Safety Appliance Act, what constitutes, 1330.
- automatic couplers, injury to employes on duty, violation of Safety Appliance Act not actionable, 1347.
  - necessity of couplers, 1351.
  - trainmen on top of cars protected, 1346.
  - violation of Safety Appliance Act, illustrations, 1341.
- defective cars, movement, law prior to amendment, Safety Appliance Act, 1398.
- delay, ordinary delay incident to train operation not excuse for violation of Hours of Service Act, 1481.
- hand brakes, application of Safety Appliance Act, 1372.
- interstate commerce, application of Safety Appliance Act,
  - car on switching track for repairs, 1302.
  - dining car used for interstate train on siding, 1303.
  - preparation, switching cars in yards, 1300.
  - transferring cars to industrial track, 1305.
- intrastate cars, validity of amendment including, Safety Appliance Act, 1273.
- knowledge of defect by employe, suit not barred, Safety Appliance Act, 1402.
- repair of cars, application of Safety Appliance Act, 1316, 1318.
  - movement from repair point prohibited, 1389, 1390.
  - right to move in revenue trains or with other cars, 1391.
- Safety Appliance Act, duties imposed by statute in one relation not actionable in another, 1318.
- exceptions, strict construction of exceptions, 1396.

**Switchman,**

- Hours of Service Act, carriers and employes subject to, 1434.
  - tower men and switch tenders, 1463.
- injury or death,
  - Employers' Liability Act,
    - assumption of risk, employes held not to have assumed risk, 1024.
    - evidence held not to show actionable negligence, 962.
    - evidence held to show actionable negligence, 966.
  - interstate employment, 857, 891.
    - cars loaded with lumber for repair and construction work, 890.
    - cars to be loaded with interstate freight, 881.
    - erroneous decisions holding employment to be interstate, 806.
    - going to and from work, employment in intrastate and interstate commerce, 790.
  - "making up" and "breaking up" trains in yards, 866.
  - making up trains of other companies, 891.
  - method of proving engagement in, 1221.

**Switchman—Continued.**

injury or death—continued.

- moving cars between interstate journeys, 886.
- moving intrastate cars, 879.
- preparing trains for interstate movement, 860.
- repair of loaded cars, 885.
- repairing side tracks, spurs and switches, 823.
- repairing tracks, 821.
- switching intrastate cars into or out of interstate trains, conflicting decisions, 867.
- federal control under United States decision, 871.
- test in determining interstate employment, 873, 877.
- termination of interstate journey, receipt by consignee, 884.
- termination of interstate status by delivery of cars at destination, 887.
- train and switching crews, Ch. XXV, 853-893.
- weighing cars after unloading, 883.

**Safety Appliance Act,**

- air brakes, movements between yards as distinguished from movements in yards, transfer trains, 1331.
- automatic couplers, defect as proximate cause of injury, 1361.
- contributory negligence as matter of law, going between cars to uncouple, employe held not negligent, 1414.
- grab irons used for other purposes than coupling, protection of act, 1366.

**T.****Taxes,**

- imports from foreign states, immunity from state legislation, protection of commerce clause, 16.
- interstate commerce, temporary stopping or interruption of shipments, change into intrastate commerce, 273.
- state and national control over interstate carriers and transportation, general principles determining, illustration, 41.
- "original package" defined, protection of Interstate Commerce Clause, 24.

**Telegraphs and telephones,**

- employes engaged in interstate commerce, Employers' Liability Act, construction work, future use in interstate commerce, 810.
- linemen repairing telegraphs and telephones, 851, 909.
- federal control, scope, historical review, effect of Interstate Commerce Act, 137.
- Hours of Service Act, carriers and employes subject to, 1434.
- emergency, 1482.
- insubordination of employe as emergency, 1484.
- limitation upon hours of service, 1462.
- tower men and switch tenders, 1462.

**Telegraphs and telephones—Continued.**

Hours of Service Act, etc.—continued.

separate periods of service, statutory period not exceeded, 1468.

telegraph offices operated during day and part of night, limitations upon hours of service, 1467.

telegraph offices, two offices in one community as one "place," 1469.

Interstate Commerce Act,

act not applicable to all interstate commerce, 300.

telegraph, telephone and cable companies, subjection to act, 245, 246.

statutory provision, 201.

"Interstate commerce" as used in federal constitution, definition, 8.

interstate commerce, intercourse by telephone or telegraph, as commerce, 104, 245.

state and national control, general principles determining, illustration, 42.

transportation wholly in one state not subject to Interstate Commerce Act, 285.

intrastate commerce, state control, rates, power to fix, recognition by Interstate Commerce Act, 73.

licenses, immunity from state legislation, protection of commerce clause, 19.

"regulation," interstate and foreign commerce, definition and explanation of power, 14.

power of state to regulate interstate messages, invalidity since Amendment of 1910 to Interstate Commerce Act, 102.

power prior to Amendment of 1910 to Interstate Commerce Act, 100.

"ticker service," not subject to regulation by state, 104.

state laws superseded by federal control under Interstate Commerce Act, 248.

war, President's assumption of control, proclamation of 1916, 109.

**Tenders,**

see LOCOMOTIVES.

**Terminal railroads,**

subjection to Interstate Commerce Act, 234.

**Terminals,**

Hours of Service Act, relief crews, duty to substitute, prevention of excessive hours, 1454.

**Territories,**

application of statutes,

Adamson Law, eight hours as basis of day's work, 1507.

Ash Pan Act, 1502.

Boiler Inspection Act, 1491.



**Territories—Continued.**

application of statutes—continued.

Employers' Liability Act, 758.

Interstate Commerce Act, 205.

Safety Appliance Act, 1269, 1281.

Employers' Liability Act of 1906, invalidity, 691.

"interstate commerce," definition, Accident Reports Act, 1504.

**Tests,**

boiler inspection, orders of Interstate Commerce Commission, 1644, 1652, 1666, 1667.

**Theaters,**

rates, sale of number of tickets at less than for single passenger, undue preference, 422.

limitation to particular classes of persons unlawful, 425.

**Timber,**

employees engaged in interstate commerce, Employers' Liability Act, 831.

removing bolts from timbers taken from interstate bridges, 819.

**Time,**

discrimination, long existence of undue discrimination not justification for continuance, 319.

hours of work, see HOURS OF SERVICE.

**Tobacco,**

licenses, imports from foreign states, immunity from state legislation, protection of commerce clause, 20.

**Toll roads,**

common carriers, bridge companies subject to Interstate Commerce Act, 226.

**Tools,**

negligence, criterion of liability, ordinary care of railroads required, Employers' Liability Act, 914.

**Torts,**

former adjudication, commencement of action under state law not bar to suit under Employers' Liability Act, 1240.

relief fund, acceptance of benefits by employe, actions against joint tort-feasors not barred, Employers' Liability Act, 1134.

Safety Appliance Act, duties imposed by statute in one relation not actionable in another, 1318.

**Towermen,**

Hours of Service Act, limitation, tower men and switch tenders, 1462.  
telegraph offices, two offices in one community as one "place,"  
1469.

**Trackmen,**

see SECTIONMAN INJURED OR KILLED.  
employees engaged in interstate commerce, removing old rails and  
storing new ones, Employers' Liability Act, 828.

**Tracks,**

intrastate cars used on tracks other than main lines, application of  
Safety Appliance Act, 1277.  
new industry tracks, order of director general of railroads, 1696.

**Trade unions,**

Board of Adjustment, order of director general of railroads, 1692.  
regulations of Congress, validity, necessity of connection with inter-  
state commerce, 51.

**Train dispatchers,**

Hours of Service Act,  
additional hours of service, emergency, 1482.  
insubordination of employe as emergency, 1484.  
evasion of statute, statute may not be violated by requiring differ-  
ent service after statutory period, 1446.  
limitation upon hours of service, 1462.  
separate periods of service, statutory period not exceeded, 1468.  
telegraph offices, two offices in one community as one "place,"  
1469.  
validity, classification of operators, statute not invalid, 1439.

**Trains,**

see RAILROADS.

**Transcripts,**

rules of Interstate Commerce Commission, 1584.  
testimony before Commerce Commission, furnishing two parties, 681.

**Transfer trains,**

air brakes, necessity, movements between yards as distinguished from  
movements in yards, Safety Appliance Act, 1331.

**Transportation,**

see CARRIERS.

**Trial,**

see ACTIONS; APPEAL AND ERROR; BRIEFS; EVIDENCE; PLEADING; PROCESS;  
REMOVAL OF CAUSES, etc.

**Trial—Continued.**

- complaints, filing before Commerce Commission, rules governing, 671.
- Employers' Liability Act, pleading, sufficiency, state law controlling, 1197.
  - procedure, state laws, controlling effect, 733.
  - time of commencement of action as question of procedure, limitations, 1143.
- exhibits, automatic couplers, actions for injuries, exhibition of model couplers, Safety Appliance Act, 1362.
- instructions to juries,
  - Employers' Liability Act,
    - appeal, harmless error 1243.
    - assumption of risk, confusing with contributory negligence, 1012.
      - instruction applicable to evidence, necessity of giving, 1015.
      - omission of instruction as harmless error, 1016.
    - contributory negligence, duty of court to instruct, 1043.
    - errors, 1045.
    - language of statute not erroneous, 1045.
    - manner of instructing, 1044.
  - damages recoverable, elements, loss of care, training of minors, 1089.
    - estate of decedent not entitled to damages, 1091.
    - loss of future benefits limited to present cash value, 1077.
    - measure of damages, instructions approved, 1120.
      - instructions held erroneous, 1116.
      - various beneficiaries, 1113.
    - pain and suffering, limitation to pain suffered before death, 1068.
    - reference to sum sued for not error, 1124.
  - death, beneficiaries, statutory action not for equal benefit of surviving beneficiaries, 1081.
  - parties, death case, suit only by personal representative, 1170.
- Safety Appliance Act,
  - assumption of risk, two distinct acts of negligence, right to instructions, 1402.
  - automatic couplers, instructions as to violation of statute, 1361.
    - preparation for coupling, regulation, 1357.
  - contributory negligence, choosing dangerous way to uncouple cars
    - instructions held erroneous, 1412.
  - drawbars, height, instructions erroneous under old and new orders of Interstate Commerce Commission, 1379.
    - instructions erroneous under old order of Interstate Commerce Commission, correctness under new order, 1379.
  - interstate employment not alleged, submission of case not error, 1421.
  - "preponderance of evidence," definition, actions for penalties, 1427.
  - rule prohibiting going between moving cars, effect, 1408.

**Trial—Continued.**

orders of Commission, enforcement, service, duties of carriers, 683.  
practice under Employers' Liability Act, Ch. XXXVIII, 1227-1248.  
procedure before Interstate Commerce Commission, Ch. XX, 664-686.  
questions of fact,

discrimination, existence of unjust discrimination or undue preference as question of fact, 317.

**Employers' Liability Act,**

assumption of risk, application of doctrine, 996.

demurrer to evidence, state law not controlling, 1220.

employees engaged in interstate commerce, 798.

limitation, submission to jury as error, 1143.

negligence, determination according to decisions of Federal court, final decision of Supreme court, 933.

**Safety Appliance Act,**

automatic couplers, defect as proximate cause of injury, 1361.  
contributory negligence, 1414.

choosing dangerous way to uncouple cars, safe method available, 1409.

going between cars to uncouple, employee held not negligent, 1414.

proximate cause, question not ordinarily for jury, 1327.

repairs, necessity of movement for repairs, 1398.

rehearing before Interstate Commerce Commission, procedure, 684.

rules of Interstate Commerce Commission, 1575-1589.

Safety Appliance Act, pleading and practice, actions for personal injury, Ch. XLIX, 1416-1424.

stay of trial, actions against railroads, order of director general, 1708.

**Turntables,**

employees engaged in interstate commerce, repairing turntables, Employers' Liability Act, 824.

**Twenty-Eight-Hour Live Stock Law,**

Ch. LII, 1487-1490.

application of statute, animals properly cared for, statute not applicable, 1490.

duties of carriers, 1487.

excuse from compliance with statute, accidents, 1488.

extension of time, written request of owner, 1488.

feeding animals at expense of owner, unloading pursuant to statute, 1489.

Hours of Service Act, exceptions, carrier must exercise high degree of diligence, 1475.

loading and unloading live stock, time consumed not to be considered, exception as to sheep, 1488.

penalties, recovery in civil action, 1490.

text, 1669.

violation, penalties, 1489.

## U.

**United States,**

power of Congress, see CONGRESS.

## V.

**Valuation,**

loss and damage, initial carrier's liability, causes leading to enactment of Cummins Amendment to Carmack Amendment, agreed valuation clause in bill of lading, notice of loss, 558.

**Valuation Act,**

Interstate Commerce Act, amendments, valuation of property of interstate carriers, duty of Commission under Act of 1913, 195.

**Value,**

loss and damage, limitation of liability by carrier to value at place of shipment, 606.

**Vehicles,**

baggage, Interstate Commerce Act not applicable to all interstate commerce, 300.

discrimination, exclusive privileges, auxiliary facilities at stations and terminal grounds, legality, 339.

hauling by vehicle from destination point, reduced rates not permitted, 362.

track storage and demurrage charges, 345.

drawbars, necessity, application of Safety Appliance Act to locomotives, 1380.

employees engaged in interstate commerce, construction work, future use in interstate commerce, Employers' Liability Act, 810.

explosives, transportation, text of federal statute, 1676.

rates, discrimination, different interstate and intrastate rates between localities, prejudice resulting, 376.

publication and filing, vehicles on railroad ferries, rates for passage to be filed, 483.

**Safety Appliance Act,**

application of act to all cars, 1351.

cars and vehicles subject to statute, 1280.

provision of act, 1340.

text, 1593-1597.

truckman, employees engaged in interstate commerce, loading and unloading freight, Employers' Liability Act, 901.

**Vendor and purchaser,**

discrimination, rates, rebates to pay for land for right of way, 368.

**Venue,****Employers' Liability Act,**

action may be brought in federal courts, 1145.

**Venue—Continued.****Employers' Liability Act—continued.**

- action may be brought in state courts, 1146.
- defects, Amendments of 1910, 713.
- order of director general of railroads, 1700.
- purpose of Amendment of 1910, 715.
- hearing before Commerce Commission, place of holding, 678.
- Interstate Commerce Commission, text of statute, 1535.
- loss and damage to interstate shipments, initial carrier's liability, Carmack Amendment, action in domicile of terminal carrier prohibited, 550.
- order of director general of railroads, 1700.
- war, federal control and compensation of carriers during war with Germany, effect of statute upon other federal and state laws, 127.

**Verdicts and findings,**

- appeal, writ of error, excessive verdict not reviewable, Employers' Liability Act, 1166.
- apportionment, harmless errors, actions under Employers' Liability Act, 1243.
- claims for reparation, basis on findings of Commerce Commission, 674.
- damages for violation of Interstate Commerce Act, findings of fact by commission required, award of damages against carriers, 516.
- rates, findings of commission as to reasonableness of rates, all persons benefited, 515.
- validity of statute, 517.
- death, damages recoverable under Employers' Liability Act, apportionment, excessive apportionment to one beneficiary, effect, 1126.
  - apportionment to each beneficiary in verdict, 1129.
  - loss of future benefits limited to present cash value, 1077.
  - reduction because of contributory negligence, propriety of special verdicts, 1128.
- Employers' Liability Act, procedure, controlling effect of state laws, 733.
- employees engaged in interstate commerce, question of employment as question of fact, Employers' Liability Act, 798.
- judgment notwithstanding verdict, power of state courts to direct, action under Employers' Liability Act, 1246.
- limitation, Employers' Liability Act, question of limitation, submission to jury as error, 1143.
- number of jurors, state laws permitting verdict by less than twelve, validity in actions under Employers' Liability Act, 1236.

**Verification,**

- applications of carriers, relief by Interstate Commerce Commission, 675.
- reports, filing sworn reports of carriers, Boiler Inspection Act, 1499.

**Vessels,**

- assumption of control, order of director general of railroads, 1701.
- "common control, management or arrangement for a continuous carriage or shipment," definition and explanation of term in Interstate Commerce Act, 216.
- competing water lines, control or ownership of carrier by rail, prohibition, approval of Interstate Commerce Commission, Panama Canal Act, 223.
- policy of Congress, 224.
- connection between railroads and water carriers, establishment by Commerce Commission, 658.
- defects of equipment, negligence under Employers' Liability Act, 912.
- discrimination, grant of wharfage privilege denied to other shippers, 351.
- lighterage services, free delivery zone, shippers outside zone not discriminated against, 365.
- railroad discriminating against steamship lines, power of Interstate Commerce Commission, 657.
- through routes and joint rates with water lines, refusal of railroad to establish, 338.
- Employers' Liability Act, remedies, employes on vessels owned by railroads not included, 730.
- explosives, transportation, text of federal statute, 1676.
- federal control, railroads wholly within state, character of transportation, interstate shipments, 207.
- imports from foreign states, immunity from state legislation, protection of commerce clause, 19.
- Interstate Commerce Act,
  - act not applicable to all interstate commerce, 300.
  - amendments, water carriers, extension of jurisdiction of Commission by Panama Canal Act of 1912, 195.
  - carriers subject to act, statutory provision, 201.
  - all carriers in Alaska, District of Columbia and territories, 205.
  - common arrangement of carrier by water with carrier by rail, 211.
  - federal jurisdiction over water carriers, extension by Panama Canal Act of 1912, 218, 220.
  - individuals and partnerships, 260.
  - shipment from one foreign country to another foreign country, passage through United States not subject to act, 282.
- interstate transportation, shipment from one state to port in same state, transshipment for exporting, 281.
- temporary stopping or interruption of shipments, interstate character not changed, 276.
- licenses, judicial construction of commerce clause of Federal Constitution, early decision, conflict of state and federal law, 5.
- "map compete for traffic," prohibition of ownership of competing water lines of carrier by rail, 225.

**Vessels—Continued.**

- negligence, evidence held not to show actionable negligence, Employers' Liability Act, 969.
- pilots, state and national control over interstate carriers and transportation, general principles determining, illustration, 47.
- railroads, application of Employers' Liability Act to railroads which are common carriers, railroad wholly within single state, 742.
- vessels or ships not parts of railroad systems, 754.
- rates, discrimination, differentials between Atlantic coast cities, competitors, relations between carriers, 390.
- long and short haul provision, amendment to Interstate Commerce Act, 191.
- power of state to establish, absence of federal legislation, 94.
- publication and filing, Interstate Commerce Act mandatory, 437.
- reduction to meet water competition, increase subject to approval of Commission, 658.
- state and national control over interstate carriers and transportation, general principles determining, illustration, 44.
- text of Interstate Commerce Act, 1517.
- through routes and joint rates, establishment, power of Interstate Commerce Commission, 176, 646, 648.
- transportation to foreign countries, 649.
- "regulation" of interstate and foreign commerce, definition and explanation of power, 14.
- shipments, privileges, order of director general of railroads, 1775.
- switching service at ports, imported goods, subject to Interstate Commerce Act, 297.
- Twenty-Eight-Hour Live Stock Law,
  - animals properly cared for, statute not applicable, 1490.
  - duties of carriers, 1487.
  - feeding animals at expense of owner, unloading pursuant to law, 1489.
  - text of act, 1669.
  - violation of, penalties, 1489.
- war, control by federal government, text of statute, 1566-1574.
  - President's assumption of control of railroads, proclamation of 1916, 109.
- water lines, Commerce Commission may authorize railroads to continue ownership, 652.

**W.****Wages,**

- Adamson Law, Ch. LVI, 1507-1509.
  - commission to observe, appointment by President, 1508.
  - eight hours as basis of day's work, 1507.
  - penalties, violation of law, 1509.
  - railroads and employes excepted, 1507.
  - reduction of wages pending report of commission prohibited, 1508.



**Wages—Continued.**

Adamson Law, etc.—continued.

text of law, 1674.

validity, 1509.

Board of Adjustment, order of director general of railroads, 1692, 1748.

contracts, prohibition of Federal Employers' Liability Act, statutory provision, validity, 1132.

death, damages recoverable under Employers' Liability Act, compensatory damages, measure, 1073.

hours of work, see HOURS OF SERVICE.

increase, order of director general of railroads, 1687, 1709-1734.

investigation, general order of director general of railroads, 1682.

services of shippers, allowance of compensation, denial to other shippers not illegal, 357.

discrimination, services rendered by shippers, unreasonable compensation to shippers, 348.

supplementary orders, director general of railroads, 1756-1769.

**Waiver,**

parties, death cases, want of legal capacity to sue in widow cannot be waived, Employers' Liability Act, 1173.

rates, publication and filing, changes prohibited, defenses of estoppel and waiver not available, actions against shippers for under charges, 470.

**War,**

carriers, federal and state control during war, Ch. III, 108-133.

President's power to control transportation systems in time of war, 109.

commodities essential to national defense, President authorized to direct movement of, 198.

director general of railroads, general orders, federal control, 1678-1783.

federal control and compensation of carriers during war with Germany, effect of statute upon other federal and state laws, 127.

federal statute, 114.

penalty for violation of federal statute, 132.

President's assumption of control of railroads, proclamation of 1916, 109.

purpose of enactment, 115.

rates for transportation, authority of President to fix, 128.

right to sue carriers under federal control, 129.

termination of federal control under statute, 133.

text of statute, 1566-1574.

interference with interstate commerce, text of statute, 1551.

obstruction of movement of interstate commerce as crime, Amendment of 1917 to Interstate Commerce Act, 197.

**War—Continued.**

- power of Congress over carriers during time of war and time of peace, distinction, 108.
- text of Interstate Commerce Act, 1521.

**Warehouses,**

- discrimination, storage regulations, preferences prohibited, 361.
- track storage and demurrage charges, 345.
- interstate commerce, temporary stopping or interruption of shipments, change into intrastate commerce, 273.
- loss and damage, carrier's liability as warehouseman, nature, 593.
- initial carrier's liability, property held by terminal carriers as warehousemen, 592.
- negligence, burden of proof, regulations of Congress, common law of state courts superseded, 60.

**Watchmen,**

- employees engaged in interstate commerce, Employers' Liability Act, 901, 909.
- interstate commerce, evidence held not sufficient to show, 1224.

**Water,**

- carriers by water, see VESSELS,
- pipe line companies, transportation of companies' own commodity, subjection to Interstate Commerce Act, 241.
- transportation of oil and other commodities, 241.

**Waybills,**

- interstate commerce, method of proving engagement in, train and switching crews, Employers' Liability Act, 1221.
- order of director general of railroads, 1688.

**Waycars,**

- see CARS.

**Webb-Kenyon Act,**

- intoxicating liquors, regulation of shipment by states, federal statutory exceptions establishing power, 32.

**Weights,**

- employees engaged in interstate commerce, weighing cars after unloading, Employers' Liability Act, 883.
- interstate commerce, weighing of shipments of freight, federal control under Interstate Commerce Act, 290.

**Wharves,**

- see HARBORS.
- defects of equipment, negligence under Employers' Liability Act, 912.

**Wheels,**

- orders of Interstate Commerce Commission, boiler inspection, 1659-1662, 1663.

**Wilson Act,**

intoxicating liquors, regulation of shipment by states, federal statutory exceptions establishing power, 30.

**Wireless telegraphy,**

carriers subject to Interstate Commerce Act, statutory provision, 201.

telegraph, telephone and cable companies as common carriers, 246.

—"regulation" of interstate and foreign commerce, definition and explanation of power, 14.

**Witnesses,**

accidents, text of federal statute, 1672.

depositions, power of Commerce Commission to order, 677.

evidence, admissibility, testimony of widow or other beneficiaries, determination by law of forum, Employers' Liability Act, 1219.

hearing before Commerce Commission, method, 677.

Commission may compel attendance and testimony, 679.

power to summon witnesses, Amendment of 1891, 161.

testimony before Interstate Commerce Commission, invalid provision of statute remedied by enactment of Compulsory Testimony Act, 162.

text of statute, 1526.

investigation by Interstate Commerce Commission, Accident Reports Act, 1505.

rules of Interstate Commerce Commission, 1581.

**Workmen's Compensation Acts,**

"dependency," damages recoverable by next of kin, Employers' Liability Act, 1106.

state laws superseded by Employers' Liability Act, extent, 726.

**Wrecks,**

employees engaged in interstate commerce, removing debris and constructing temporary tracks, Employers' Liability Act, 825.

Hours of Service Act, when statute is not applicable, 1471.

additional hours of service, emergency, insubordination of employee as emergency, 1484.

limitation, employees "on duty," commencement and termination of service, 1448.

**Writ of error,**

see APPEAL AND ERROR.

**Y.****Yard clerk,**

employees engaged in interstate commerce, Employers' Liability Act, 903.

**Yardmen,**

Hours of Service Act, limitation upon hours of service, 1462.

**Z.****Zones,**

rates, discrimination, group rates, establishment and maintenance, by Interstate Commerce Commission, 387.







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